# A MODEL STATUTE TO REGULATE UNFAIR ADVERTISING AND SALES PRACTICES IN ALABAMA

By

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# A MODEL STATUTE TO REGULATE UNFAIR ADVERTISING AND SALES PRACTICES IN ALABAMA

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The decade of the 70's has been described by many as the "age of consumers." Indeed, much legislation has been passed in recent times at both the federal and state levels aimed at broadening the scope of consumer protection. Alabama has failed to keep pace with the current trend in consumer legislation; thus, the purpose of this study was to examine the extent of consumer protection afforded citizens of Alabama and to design a model statute to regulate unfair advertising and sales practices which will extend the bounds of protection to compare favorably with current consumer legislation in other states.

A search of secondary sources of information provided data relative to the existing legal environment in Alabama and helped to establish an understanding of the current legislative trends in consumer protection in other states. Members of the Alabama Legislature were surveyed by direct

mail to determine their attitudes toward specific legislative areas and to develop insight into their perception of the special problems associated with protecting the citizens of Alabama in the marketplace. Administrators of consumer protection programs in the other forty-nine states of the Union were also surveyed by direct mail to ascertain the legal basis of their programs and to determine the resources devoted to their assigned tasks.

The examination of consumer protection programs in other states revealed a common approach in dealing with problems of consumer abuse. Since 1961, some thirty-seven states have passed consumer legislation providing for civil remedies as opposed to the traditional approach of utilizing criminal proceedings as a means of combating fraudulent business practices. The more lenient requirements of proof of a misdeed and the restorative type of remedies available under civil law have generally proven to be a more effective means of protecting the consumer interest. The Attorney General is given enforcement responsibility in the majority of these states.

The survey of the Alabama Legislature revealed that the majority of its members was cognizant of the problems of consumer abuse in their home state and was in favor of legislation which would expand consumer protection activities. When questioned on specific legislative items, the legislators gave a generally positive response

toward the enactment of civil remedies and procedures to regulate unfair advertising and selling practices.

The model statute, the end product of this research, was designed with the intent of receiving the support evidenced by the survey of the legislature. The key section of the proposed statute which generally defines unfair trade practices is modeled after the Federal Trade Commission Act and states that "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The model code provides for several types of civil remedies. The program administrator (the code suggests that the Attorney General's office be given the responsibility) may seek injunctions, restorative payments to injured consumers, and punitive damages to be assessed against flagrant or repetitive violators. The proposed statute likewise provides for private remedies and the possibility of class actions.

This study should prove useful to the Alabama Legislature in highlighting the current trends in state consumer protection legislation as well as proposing a model code which recognizes the special needs for consumer protection in Alabama. Consumers in the State of Alabama stand to benefit from this study if it is in some way instrumental in influencing protective legislation.

# CHAPTER I

## INTRODUCTION

> During the past decade, there has been increasing concern both in the public and private sectors for the rights and interests of the consumer. The allegations made by consumer advocates are sharply critical of business, particularly marketing practices and performance of the marketing system.[1]

The term "consumerism," which became attached to the consumer movement in the mid-1960's, refers to "the widening range of activities of government, business and independent organizations that are designed to protect individuals from practices of both business and government that infringe upon their rights as consumers."[2] The present emphasis on the consumers' interest came into focus in the sixties with numerous books and articles being written on the plight of the consumer in the marketplace.[3] Yet, this movement did not emerge overnight; "efforts to protect health, safety and economic well-being of the consumer have been undertaken for several decades."[4] An examination of the history of the consumer movement reveals three major periods of consumer unrest.

The first major movement in consumer protection occurred at the turn of this century. Generally referred to as the "muckraking era," it was fomented by such exposés of commercial corruption as found in Upton Sinclair's book, The

Jungle.[5] The Federal Pure Food and Drug Act was passed in 1906 as a direct result of this period of consumer unrest. During that same period, impetus for the Printers Ink model statute to deal with deceptive and fraudulent advertising emerged from the business environment, and the Federal Trade Commission was created to protect the consumer indirectly by preventing "unfair methods of competition."

The second major period of consumer unrest came in the mid-1930's. The most significant achievement of this period's movement was the passage in 1938 of the Wheeler-Lea Amendment to the Federal Trade Commission Act. This marked the first real departure from the traditional assumption of caveat emptor in consumer transactions.[6] This act made it possible for the Federal Trade Commission to prosecute for deceptive advertising or sales practices without having to prove injury to competition. That same year (1938) the Federal Food, Drug and Cosmetic Act was passed to strengthen the previous pure food law and extend its scope to cover cosmetics and therapeutic devices. Also related to this period of consumer unrest was the passage of the Securities Act of 1933 and the Securities and Exchange Commission Act of 1934. The informative policy set by these two bills established the precedent for the more recent legislation--truth-in-packaging and truth-in-lending.[7]

The third period of consumer activity began in the early 1960's. Former President John F. Kennedy brought this particular movement into perspective when he sent a special

message to Congress proclaiming the four basic consumer rights--the right to safety, the right to be heard, the right to choose, and the right to be informed.[8] The issues in this most recent movement are numerous and varied as compared to the two earlier periods of unrest. Consumer action and reaction point toward three persisting problem areas:

(1) Ill-considered applications of new technology which result in dangerous or unreliable products,

(2) Changing conceptions of the social responsibilities of business and

(3) The operations of the dishonest fringe and occasional lapses of others in the business community.[9]

In terms of output of legislation, the current consumer movement has been far more successful than the two earlier periods. A close examination reveals that nearly three times as much consumer legislation has been passed since the 1960's as was legislated in all of the previous years of the twentieth century combined.[10] A brief summary of the major legislation arising out of this more recent consumer movement includes auto safety regulation, cigarette labeling, truth-in-packaging, child safety, flammable fabrics, truth-in-lending, toy safety, poison prevention, fair credit reporting, and environmental protection legislation. In addition, the President recently appointed a national commission to study consumer protection.[11]

## Need for Consumer Protection

The textbook approach to consumer economics places the consumer on an equal and competitive footing with the vendor with whom he deals. Such an "ideal" in information and bargaining power is not readily found in the market environment. The underlying reasons for current consumer unrest can be explained in terms of (1) an inadequate information base, (2) the credibility gap between business, the consumer and government, and (3) rising consumer expectations.[12] The consumer is becoming better organized and increasingly more vocal in representing his interests and desires in the marketplace. In sheer numbers, the volume of consumer complaints lodged with protection agencies has increased dramatically.

In 1970, the 150 Better Business Bureaus located across the United States handled slightly over seven million queries and complaints pertaining to deceptive practices; moreover, the number has spiraled since that time.[13] It has been estimated, however, that fewer than 20 per cent of the "calls" made to the Better Business Bureaus are complaints about products, services or unethical business practices. The majority of the calls are requests for information to aid consumers in the buying decision.[14] The Federal Trade Commission, with its eleven field offices, has a similarly heavy number of consumer communications. During the fiscal year ending June 30, 1972, the Commission received approximately 13,500 telephone calls and written messages concerning consumer protection.[15] The Office of Consumer Protection, recently shifted to the

Department of Health, Education and Welfare, likewise processes a large number of complaints and inquiries. Recent estimates place this number at between 800 and 1,000 per week.[16]

A similar pattern occurs in Alabama. The State Attorney General's Office is now receiving approximately 350 complaints per month, as compared to roughly 300 per month a year ago.* The Governor's Office of Consumer Protection, created February 17, 1972, by executive order, processed approximately 2,000 complaints its first year of operation.[17] A survey of the members of the State Legislature, to be presented later, also showed a substantial number of complaints and/or suggestions being directed towards the lawmakers. Some 62 per cent of the state legislative body reported receiving between one to five consumer messages per month.

The number of complaints arising out of consumer abuse on a state and national level gives some idea as to the magnitude and awareness of consumer problems. Surely, there is duplication of complaints as well as evidence to suggest that the number reported is far less than the injustices suffered at the hands of unscrupulous merchants;[18] but this number does indicate the desire for assistance on the part of the consumer or the demand from some of those injured to take constructive action.

*Tom Brassell, Assistant to the Attorney General of the State of Alabama, telephone interview, April 2, 1973.

A precise measure of the aggregate dollar loss to the economic system due to fraudulent business practices as well as an estimate of the externalized social costs to the American society would strengthen the cause for greater consumer protection. Unfortunately, there is no readily available body of reliable data that would produce a quantitative measure of the magnitude of unredressed consumer grievances in the United States.[19] Rough estimates place the national loss due to fraudulent and deceptive business practices in the millions of dollars annually.[20] At the state level, Tom Brassell, who heads the Consumer Services effort in the Attorney General's Office, conservatively estimates the economic loss at five million dollars annually.*

It is obvious from the volume of complaints being aired and the attendent emphasis being focused on the consumer's plight that adequate means of redress and prevention of consumer injuries are not presently available on a widespread basis. Neither consumer self-help programs nor voluntary compliance and mediation by the business environment have been able to overcome consumer transactional problems. Thus more governmental involvement in the business of consumer protection is needed.[21]

The Federal government has traditionally exercised the greatest influence in consumer protection; however, many states are beginning to exert substantial influence

*Brassell, telephone interview.

in this area. The states of Washington and Illinois appear to lead in this move toward state involvement in consumer matters. In 1961, both states passed extensive consumer legislation which carried the Federal thrust toward protecting the consumers' interest to the state level--involving matters which are predominately intrastate in character. Since 1961, some thirty-seven states have enacted legislation designed to protect the consumers' interest in the marketplace. However, the State of Alabama has failed to initiate any action to extend protection in the consumers' behalf. Too, the consumer protection agencies which have been created in the state are hampered by limited legal authority and small budgets. The primary role which these bureaus play is to provide a local, centralized agency through which complaints are channeled; in fact, mediation is their main avenue toward remedying consumer problems.

## Nature, Scope and Purpose of Study

The purpose of this study is to examine the extent of consumer protection afforded citizens of Alabama and to design a model for state legislation which will extend the bounds of protection to compare with those of other states. The scope of consumer protection activities is, however, becoming kaleidoscopic in nature. Consumerism can be broadly defined to encompass environmental questions, false weights and measures, protection of one's health and safety, package contents and quality assurances as well as to further shield the consumer in his business dealings with vendors

who are not altogether honest. Because of this breadth of activities, which are categorized under the heading of consumer protection, this study concentrates upon unfair advertising and sales practices. Such restriction is deemed necessary in order to give adequate depth to this investigation. Likewise, input from the Attorney General's Office suggests that at the present time this is the area of legislative action which is most deficient relative to consumer protection.*

The legal framework which provides individuals in the State of Alabama protection from false and misleading advertising and selling practices is presented and compared with existing consumer statutes in other states. Protection emanating from Federal legislation is likewise examined to show the areas of parallel protection. Legislative enactment is, however, only one part of the whole system of consumer protection; administrative action and judicial interpretations aid by giving expression to the laws governing consumer abuse. Cases from both the state and Federal court system pertaining to this area are presented to show the trend and pattern of consumer protection afforded Alabama residents.

Consumer protective agencies within the State of Alabama were investigated to ascertain the boundaries of their authority, the activities they are undertaking, and the resources allocated to their task. Federally sponsored

*Brassell, telephone interview.

programs which protect the citizens from abusive advertising and sales practices are, likewise, outlined to show the differences and similarities of the two programs. Such an examination points to the need for establishing the role of both parties in protecting the interests of the consumer. Here, the experience of other states in establishing their boundaries of protection and the degree of Federal-state involvement should provide a guideline in determining the need and extent of state involvement.

Concern is directed towards specific problems which are unique to Alabama in protecting the interests of the consumer. Alabama's special needs in the area of consumer protection are examined in both the agency study mentioned above and in a subsequent survey of the state legislature. Much attention is focused on the replies of the legislators as it is assumed that they are representative of the citizenry and are well informed concerning the complaints which their constituents have regarding unfair advertising and sales practices.

The end objective of this study is to design a model statute to regulate unfair advertising and sales practices within the state. This proposed code is based on the legislative experiences of other states in the design and implementation of consumer protection programs. Data gathered in the legislator survey as to their degree of acceptance and support of individual "pieces" of

legislation are likewise considered in the design of a workable code. This model is then compared to the "ideal" in consumer protective legislation as to its differences and similarities and its usefulness in administering to the public's need for protection.

The final phase of this study is to suggest means of implementation of the proposed legislation should it pass as drafted. Here again, the recent experience of other states in funding and implementing their new programs for protecting their citizens is examined. It is hoped this study will be instrumental in providing a basic platform for legislative enactment in the near future and that it will give insight into the special problems with which Alabama must deal in establishing and administering a consumer protection program for the remainder of the 1970's.

## Research Methodology

Secondary information provides a strong base for this paper. Many of the secondary data which are presented here come from the Ralph Draughan Library on the Auburn University campus, the state Supreme Court Library located in the Capitol, and the Law School Library at the University of Alabama. Information pertaining to circuit court cases involving false and misleading advertising and sales practices was developed directly from the court dockets located in the court houses of Greene, Lee, and

Montgomery counties. Secondary information on protection programs in existence in other states and at the Federal level is augmented by personal interviews with agency directors such as the Regional Director of the Federal Trade Commission, and the Attorney General of Alabama and from oral and written communication with other officers of importance.

Much information pertaining to recent legislation on consumer protection at the state level is not yet available from the updating services for the various state codebooks. Results of a survey of the respective program administrators in the other forty-nine states do, however, present a current picture of consumer protection legislation pertaining primarily to false and misleading advertising and sales practices in force at this time.

Members of the Alabama State Legislature were surveyed in two ways. Leaders in the area of consumer protection were personally interviewed to determine their interest in legislative enactment, observations of special consumer problems in Alabama, and their opinions as to the likelihood of passage of different facets of consumer protection. The remaining members of the Legislature were reached by a direct mail questionnaire designed to determine their support or rejection of particular points comprising a protection program and to note any specific areas of needed consumer protection with which they were familiar.

## Chapter Summary

Chapter I introduces the reader generally to the fact that consumerism is a growing force in the marketplace. It notes that many states have taken constructive action to increase the amount of protection afforded their citizens, while Alabama, unfortunately, has not followed suit. The purpose of this discourse is outlined along with a statement of the research methodology utilized in this study.

Chapter II, which commences with a brief sketch of consumer protective activities, gives an insight into our common law heritage and the traditional methods of dealing with false and deceitful representations. Next, the present Federal protective agencies which deal with consumer abuses are examined. The Federal Trade Commission and the President's Special Advisor on Consumer Affairs are particularly highlighted because of the important role which they currently play in the Federal consumer protection program. The second chapter concludes with a discourse on the need for state involvement in consumer protection. Here the boundaries of Federal responsibility and authority are delineated in order to arrive at a conclusion as to the degree of state involvement needed and desired within Alabama.

The principal topic of Chapter III describes the present legal environment which protects the interest of Alabama's citizens in their dealings with unscrupulous merchants. This section particularly contrasts the

criminal law and the private avenues of remedy available to injured consumers. Protective action on the part of the state is described to the extent that court briefs and administrative records permit. Private suits for damages under existing common law cannot be effectively summarized because of the lack of data; however, the process of remedy will be detailed.

Chapter IV deals with the specific problems of consumer abuse found within the state. Here, the defined boundaries of consumer protection are expanded to give the reader insight into the breadth of problems encountered in affording adequate consumer protection within the state. Personal interviews with administrators of existing protective agencies in Alabama are summarized to present their views of the special problems which confront this state. The administrators' views are then contrasted to those held by the representatives of the people--the legislators. The difference in perspective will provide insight into the problems associated with the design of effective consumer protection programs.

The consumer protective activities of the other forty-nine states of the Union are summarized and presented in tabular form in Chapter V. State legislation affecting false and misleading advertising, sales practices and associated areas are displayed to show the degree of legal protection afforded citizens of each state. A chronological listing of the effective date of passage of

new state legislation shows those states which first moved to take action in the behalf of the consumer and the way in which consumer protective legislative packages build upon one another. The other half of legislative enactment--a survey of administrative action--completes this chapter. The various means of implementing and the manpower assigned to enforcing consumer programs within state boundaries are then discussed.

Chapter VI presents the end result of this study--a model code for the state of Alabama to regulate unfair advertising and sales practices. The product of other states' legislative efforts has been reviewed by select members of Alabama's Legislature and evaluated as to applicability at home. The model code which emerges out of this study is built upon the collective attitudes and opinions of members of the state Legislature. Thus theoretically, it should pass with the required approval of both legislative bodies.

Possible methods of implementing the model code are presented and briefly analyzed in order that a feasible plan of application may be devised. Alternatives as to organizing and funding agencies which might arise out of this study are likewise explored. This study concludes with the author's suggestions for further study in areas meritorious of investigation.

NOTES

[1]Hiram C. Barksdale and William R. Darden, "Consumer Attitudes Toward Marketing and Consumerism," Journal of Marketing, Vol. XXXVI, No. 4 (October, 1972), p. 28.

[2]George S. Day and David Aaker, "A Guide to Consumerism," Journal of Marketing, Vol. XXXIV, No. 3 (July, 1970), p. 13.

[3]Richard J. Barber, "Government and the Consumer," Michigan Law Review, Vol. LXIV (May, 1966), pp. 1203-1207; Raymond A. Bauer and Stephen A. Greyser, "The Dialogue That Never Happens," Harvard Business Review, Vol. XLV (Nov.-Dec., 1967), pp. 121-128; Carolyn S. Bell, "Consumer Economic Power," Journal of Consumer Affairs, Vol. II, 2, (Winter, 1968), pp. 155-166; Robert L. Birmingham, "The Consumer as King: The Economics of Precarious Sovereignty," Case Western Reserve Law Journal, Vol. XX (1969), pp. 354-362; Senator Warren G. Magnusom and Jean Carper, The Dark Side of the Marketplace (Englewood Cliffs: Prentice-Hall, Inc., 1968); Sidney Margolius, The Innocent Consumer vs. the Exploiters (New York: Trident Press, 1967); Ralph Nader, Unsafe at Any Speed (New York: Pocket Books, 1966); Eric Schnapper, "Consumer Legislation and the Poor," Yale Law Journal, Vol. LXXVI (1967), pp. 745-768; Louis L. Stern, "Consumer Protection via Increased Information," Journal of Marketing, Vol. XXXI, No. 2 (April, 1967), pp. 47-53; "Symposium on Consumer Protection," Ohio State Law Journal, Vol. XXIX (Summer, 1968), pp. 693-714; Fred Trump, Buyer Beware (New York: Abingdon Press, 1965).

[4]Ralph M. Gaedeke, "The Movement for Consumer Protection: A Century of Mixed Accomplishments," University of Washington Business Review, Vol. XXIX, No. 3 (Spring, 1970), p. 31.

[5]Upton Sinclair, The Jungle (New York: Doubleday, Page and Company, 1906).

[6]William A. Lovett, "State Deceptive Trade Practice Legislation," Tulane Law Review, Vol. XLVI, No. 4 (April, 1972), p. 728.

[7]Ibid., p. 729.

[8]U. S., Congress, House, Message from the President of the United States on Consumer Protection and Interest Program, H. R. No. 364, 87th Cong., 1st sess., March, 1962, pp. 1-10.

[9]Robert O. Herrmann, The Consumer Movement in Historical Perspective (University Park: Pennsylvania State University Press, 1970), pp. 29-30.

[10]Rolph E. Anderson and Joseph F. Hair, Jr., "Consumerism: A Force to Be Reconciled," Mississippi State Business Review, Vol. XXXIII, No. 10 (April, 1972), pp. 5-6.

[11]Mary Gardner Jones and Barry B. Boyer, "Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies," George Washington Law Review, Vol. XL, No. 3 (March, 1972), p. 358.

[12]Anderson and Hair, pp. 6-7.

[13]"Consumers Fighting Back via Better Business Bureaus," U. S. News and World Report, Vol. LXXXIII, No. 25 (December 18, 1972), p. 58.

[14]H. Bruce Palmer, "Consumerism: The Business of Business," Michigan Business Review, Vol. XXIII, No. 4 (July, 1971), p. 16.

[15]Annual Report of the Federal Trade Commission - 1972 (Washington, D. C.: Government Printing Office, 1972), p. 9.

[16]"Shift in the President's Office of Consumer Protection," The Birmingham News, March 27, 1973, p. 6.

[17]Office of Consumer Protection, Consumer Newsletter (Montgomery: State of Alabama, February, 1973), p. 1.

[18]Federal Trade Commission Report on District of Columbia Consumer Protection Program (Washington, D. C.: Government Printing Office, 1968).

[19]Jones and Boyer, p. 359.

[20]U. S., Congress, House, President's Special Message to Congress, A Buyer's Bill of Rights, H. R. No. 92-52, 92nd. Cong., 1st sess., February 25, 1971, p. 4.

[21]Jones and Boyer, pp. 382-386.

## CHAPTER II

## NEED FOR STATE INVOLVEMENT

The previous chapter generally established the fact that many consumers are becoming dissatisfied with the quality and performance of products and services they purchase in the marketplace and the manner in which these goods are sold to them. Chapter I likewise described the periods of consumer unrest that our socioeconomic environment has undergone since the turn of the century. Today's consumers are far more vocal in their dissatisfaction with the existing production and marketing system than were consumers in the past; yet the consumer's disadvantage in the marketplace is not a recent phenomenon since history points to the ancient maxim caveat emptor.

### Historical Sketch of Consumer Protection

The basic rudiments of consumer protective measures can be found in early biblical scriptures. Trade and commerce were then looked upon as lowly professions with the consumer needing protection in his dealings with merchants. The following expresses the sentiment of the times:

> Many have committed sin for a trifle
> And whosoever seeks to get rich will avert
> his eyes.

As a stake is driven firmly into a fissure
between stones,
So is sin wedged between buying and selling.[1]

In the book of Amos 8:5, written about 750 B. C., the vendor is being warned, under penalty of thirst and famine, against offering wheat for sale "deceitfully with false balances." In Leviticus 19:35-6, a similar warning is made: "You shall do no wrong in judgment, in measure of length or weights, a just ephah, and a just hin: . . ." Usury or the charging of interest was likewise prohibited (Exodus 22:25, Deuteronomy 33:19, Leviticus 25:35-8) as it was against the ethic of the time.

Roman Law

Early Roman law shows similar design. In 452 B. C., ten Roman magistrates, called decemvires, men who were vested with absolute power for a year to carry on the government, were charged with the responsibility to frame a body of laws for the republic. The result of their work has come to be known as the Law of the Twelve Tables.[2] This work was not a strict code or body of laws in the modern sense, but rather a compilation of the customary law of the times.[3] Also these laws were subject to the effects of other cultures. "The Greek influence on the code is undeniable because it was unavoidable. It came as a result of the inspection of the Hellenic states."[4]

Embodied in this ancient code were legal provisions affecting the sale and barter of movable goods and real

estate, even installment buying. "These laws were bound up closely with deep-rooted religious rituals and were often clumsy which must have slowed down transactions...."[5] In Lex XII Tabularium, the eighth table pertained to tortious wrongs. Tabula VIII, section 18, fixed the rate of interest at one per cent per month, with quadruple penalty for usury. Section 19 provided for double penalty for breach of faith by a depository; and section 21 states that if a patron is defrauded by his client, let the guilty party be devoted to the gods.[6]

When a person entered a contract, the sale of merchandise was considered binding if consideration was given. Buyers of that age had little recourse if they examined merchandise on its own merit and were then deceived; however, a fraudulent statement made by the seller to entice the sale constituted grounds for the reversal of the terms of the agreement.[7] Some misrepresentations of the product to be sold were open to question and had to be judged on their own merits. In instances where bronze was reported and sold for gold, the buyer had a remedy; but when gold was mixed with other metals and sold for gold, the lesser quality metal was still gold in the eyes of the law.[8]

The law of Rome was essentially personal--not territorial. A man was afforded protection under Roman law not because he happened to be within Roman territory, but

because he was a Roman citizen. Thus, if a man were not a citizen of the state, he was at the mercy of state's citizens. Roman law had no provisions to protect a non-citizen from unscrupulous dealings with a citizen; however, the opposite situation put the unscrupulous sojourner in jeopardy of maltreatment, loss of property, and possible enslavement.[9]

Roman law formed the basis of the legal system on the continent--in France, Holland, and Germany. In many other parts of Europe, monarchs encouraged the acceptance of Roman law at the expense of medieval customary systems, but Roman law was never formally received in England, though it was favored by Henry VIII and his descendants.[10]

The maxim of caveat emptor certainly suggests Roman background; yet

> No history has traced the expression back to its origin; a lexicographer's search could tell but part of the story. Its significance lies, not so much in the changing meaning of the words as in the developing marketing policy of which it is a graphic symbol. No Roman author whose works survive seems to have scribbled the two words down; yet, the latinity of the phrase is beyond doubt . . . In the early days, when commerce and piracy had not been clearly distinguished, and an irregular trade was carried on with a potential enemy, the words may have been employed.[11]

English Law

The term caveat emptor is reputed not to "have come into England by any reputable intellectual route. It is quite alien to the spirit of civil law. In pastorial and

agrarian times, it is true, the purchaser had scant protection; but sales were few and vendible wares were just as scarce."[12] As commerce grew in volume and importance, it was subject to greater control by English society. The term caveat emptor most likely came into usage as a warning to consumers in dealing with the "wayfaring palmer" with his relics and trinkets away from the area of organized trade. "Surely a caveat emptor may [have] emerge[d] from the folk thought of the despised trades and stand without shame before judges as an ancient maxim of common law."[13]

As early as the twelfth century, English merchants and traders developed their own courts. The parties involved in the commercial litigation were seeking quick settlement, being too busy to await trial by jury or to abide by the slow process of the existing legal system. The procedure through which disputes were settled was quite simple and straightforward. A party complained; the other party denied tortious wrongdoings. An inquest was ordered and agents of the courts were sent to gather depositions concerning the truthfulness of the allegations of the two parties in question. It became more of a test of the subjects of the suits than a judgment of the case itself. The issues were resolved, not by the law of the land, but according to the customs and usage of the merchantmen in the area. This vague body of rules is often referred to as "The Law Merchant," which, in its time, governed civil suits pertaining to commerce.[14]

In addition to "The Law Merchant" to deal with tortious wrongs, the craft guilds of the time (formed in England and elsewhere in Europe) gave some measure of protection to the consumer in his business dealings. These guilds were primarily a local phenomenon and their sphere of influence did not extend much beyond the township. The various craft guilds served as a vehicle of taxation, regulation, and control. The guilds upheld the idea of a just price and tended to fix prices at a level perceived to be fair, both to stop the accumulation of great wealth by the craftsman and to keep the market price from being excessive. Each craft guild established and enforced its own standards of quality. Furthermore merchants who used false weights or measures, adulterated their goods, or were otherwise guilty of deceit were fined and punished by their guild. Besides establishing a code and standard of conduct for their members, the craft guilds also served as a vehicle to receive complaints and provide means of redress to injured consumers.[15]

Even though the guild system and "The Law Merchant" were functional in their combined operation, they were gradually replaced by the common law as the stalwart for protecting the consumer. The common law evolved during the early part of the middle ages; however, it was not until late in the fourteenth century that the chancery or royal courts which enforced common law, began to exercise

independent jurisdiction.[16] "It [the common law] shared the domain of justice with the courts of custom, the liberties of the towns, and special tribunals . . . ."[17] Later, during the period of reformation, "the common law courts had acquired a larger share of the business of justice."[18]

Even though common law does not find its origin in Rome, a parallel in the common law and Roman law exists concerning barter and trade. Striking similarity is found in the laws governing deceit in the sale of merchandise:

> It is said that a man is liable to action for deceit if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it, if the person addressed believes it, and is thereby persuaded to act his own harm . . . .[19]

Common law goes further than moral law in stating that the liability for truth goes beyond intent to defraud. If for instance, the seller of a horse thinks his horse to be five years old and represents him to the buyer as being of that age when the horse is in fact thirteen, the seller can be sued for deceit.[20] However, as under the laws of Rome, if the seller makes no express warranty about the goodness of the item in question and the buyer purchased on the value of his examination, then caveat emptor.[21] Under common law, "the buyer who at the time of sale has failed to exact positive assurances against future contingencies deserves to take the consequences of his slothfulness."[22]

Under common law, false advertising and deceitful sales practices were subject to control through three types of remedies: (1) civil suits by injured individuals naming specific defendants; (2) civil action by competitors injured by such unfair competitive practices; and (3) criminal proceedings charged against offenders by an agent of the state. In the first instance, legal requirements and the necessity of invoidable proof of misrepresentation was sufficient to dissuade all but the most persistent or seriously injured consumer. The injured competitor was required to demonstrate injury by actual diversion of trade because of misrepresentations by others in commerce. Criminal sanctions at common law which called for prosecuting for the obtainment of money by false pretense were ill-suited to combat false and misleading advertising and sales practices.[23]

American Law

The American system of jurisprudence hails directly from English common law, as modified by the English statutes and decisions up to the time of the American Revolution. Each state, with the exception of Louisiana, has a "reception statute," adopting English common law as the basis for its legal framework.[24] "American courts, while holding English precedents to be binding, do so only to the extent that they are 'suitable to the American conditions' or are 'not in conflict with American indigenous

law,' or where later changes in conditions have not made them inapplicable."[25]

In one of the first cases in the American courts involving the common law concept of deceit,[26] the court was asked to rule on the legitimacy of the sale of kelp for barilla (a product used in the manufacture of soap). The buyer, Sweet, purchased a cargo of kelp from factor agents in New York who thought the product to be barilla. The courts ruled that the description of the article was an opinion of the seller, not a warranty, as kelp and barilla are so much alike that only scientific analysis can tell the difference. The buyer had bought the cargo at his own risk and by his own inspection; therefore, caveat emptor.

The common law heritage of American jurisprudence concerning consumer protection was focused upon the tort model of "the reasonable man." In describing this fictitious being, Justice Holmes says

> The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason.[27]

This reasonable and prudent man is described as being "a hypothetical human being with fairly typical human reactions."[28] The attributes of this imaginary person include

(a) The physical attributes of the actor himself.
(b) Normal intelligence and mental capacity.

(c) Normal perception and memory, and a minimum of experience and information common to all the community.
(d) Such superior skill and knowledge as the actor has, or holds himself as having, when he undertakes to act.[29]

From the above description of "the reasonable man" one can readily see that the term "normal" would be subject to wide latitudes in interpretation. Yet this concept of the reasonable man has served as a basis for determining if deceit and misrepresentation did indeed occur in dealings with the consumer. As Prosser in his Handbook of the Law of Torts says: "Sales talk, or puffing, as it is commonly called, is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable man would rely."[30]

The common law rule of injury befalling the reasonable and prudent man has been modified by the courts in present-day usage. The extent to which the "state" should protect the interest of its citizens is subject to question. The works of authors such as Steward Henderson Britt, David Caplovitz, Senator Warren G. Magnuson, Sidney Margolius, Fred Trump, Mark Nadel, and Gaedeke and Etcheson strongly protest that the poor and uneducated are easy prey for the unscrupulous merchant. Just how these poor and uneducated consumers differ from the tort model of the reasonable and prudent man is subject to judicial interpretation from the bench. The courts since the 1930's have been moving in

the direction of protecting the more innocent and trusting consumers.[31] Judge Augustus N. Hand, in ruling on a order by the Federal Trade Commission against General Motors, said that the Federal Trade Commission was to protect even Isaiah's "wayfaring men, though fools."[32] Federal Trade Commission rulings which have been upheld in the courts describe the protected consumer as being lured by the word "free" so as not to read all of an advertisement or order blank.[33] In fact, in the Independent Directory Corporation case,[34] the consumer was afforded protection in instances where the order blanks were given only a casual glance.

The question of where to draw the line in protecting "wayfaring fools" from being deceived is perhaps best left to the courts for interpretation. Surely the "state" needs to intervene in the absence of other protective measures. However, if the temper of protection afforded the "unthinking and credulous members of the public"[35] becomes too staunch, a minute portion of the market, the deadbeats, as Judge Lowell B. Mason describes them in the Book-of-the Month Club case,[36] might prevent a firm from honestly representing its products to the public by claiming false representation of its products.

## The Role of Federal Agencies

The historical picture of consumer protective measures shows action being taken by several different entities to

protect the consumer in his business dealings. The common law remedy seems to favor the complainant's action in civil suit to redress the wrong done to him. However, as mentioned above, such action is rarely taken unless an individual has been greatly provoked or the deceit involves substantial monetary damages. Some measure of protection is afforded the individual consumer by the different levels of our governmental structure. Since the turn of the century, the Federal government has gradually exerted its dominance in consumer protection, with the bulk of this protection being preventive action directed against individuals or firms violating the various codes or regulations, not redressing the wrong done to specific persons.

As suggested earlier, defining consumer protection in the broadest sense of the term would bring a multitude of Federal agencies under consideration. However, the primary emphasis of this investigation centers around the sphere of deceit and misrepresentation in the sale of goods. To this end, there are some twenty-one different Federal bodies, in addition to the President's Special Advisor on Consumer Affairs, which exercise some degree of control over the advertising and sale of commodities in commerce.[37]

The Federal Trade Commission

The Federal Trade Commission has the broadest jurisdiction over policing unfair and deceptive advertising and sales practices of all the federal agencies. Created

by act of Congress in 1914, this body was originally intended to police antitrust violations. In creating the Commission and granting its authority, Congress coined the phrase, "unfair methods of competition"[38] which was interpreted broadly to encompass deception of consumers in the marketplace. "From the beginning, the courts agreed that the Commission was empowered to prevent those forms of false advertising that had an impact on competition, ...."[39] The Wheeler-Lea Act of 1938 extended the Federal Trade Commission's authority to govern misrepresentations concerning food, drugs, and cosmetics as well as to prohibit "unfair or deceptive acts or practices...."[40] This act removed the need for the Federal Trade Commission to find practices anti-competitive and allowed them to act directly in the interest of the consumer.

Cases or investigation proceedings by the Federal Trade Commission may be initiated in one of three ways: complaint by an injured consumer, complaint from a firm against his supplier or competitor, or action arising out of the Federal Trade Commission's own investigative activities. The bulk of the cases which come before the Commission originate from the first two sources; yet the Federal Trade Commission is greatly expanding its investigative efforts.[41] The Commission is charged with the specific responsibility of identifying violations of law and issuing cease and desist orders.[42] Beyond this action the Commission is legally powerless; the Justice

Department is responsible for prosecuting violaters of cease and desist orders. The Commission disposes of most cases on an informal basis, either by satisfying itself that there was no serious violation of law which constitutes public injury or receiving assurance of discontinuance of the practice in question.[43] This assurance, in the form of a consent decree, may be held as proof against a firm at a later date if the firm continues the prohibited practice.

In addition, the Federal Trade Commission attempts to provide some guidelines for action through its industry guide programs, trade practice conferences, trade regulation rules and advisory opinions. These tools, along with the administrative treatment mentioned previously, are used today more than formal methods because the former are quicker, cheaper and often equally effective.[44]

The guide program attempts to outline the requirements of law pertaining to the advertising and sale of commodities. Guides such as the Guides Against Deceptive Pricing or Guides Against Bait Advertising provide a basis for the Commission's actions but they do not bind the Federal Trade Commission against future interpretations of the law. The trade practice conferences can originate either by Federal Trade Commission efforts or through requests from trade groups. The purpose of such conferences is to establish trade practice rules to outline illegal

practices and establish a code of promotional conduct for voluntary adoption. The trade regulation rule differs from the other two programs in that it has a binding effect in later litigation and may cross industry lines. These rules, to date quite narrow in scope, have pertained to specific abuses in individual industries.[45] Since mid-1971 the Commission has broadened its scope of guideline activities by requiring that all major industries provide substantive data to support their promotional claims.[46] The recent formal complaints filed against American Home Products, Bristol-Meyers and Sterling Drugs are an outgrowth of Commission action in this area of substantiation.[47]

In formal adjucation, the cease and desist order, which has most commonly taken the form of prohibiting future use of an unfair or deceptive practice, has been criticized often as an ineffectual sanction. Since 1967, in the J. B. Williams Co. v. Federal Trade Commission[48] case, the Commission has employed affirmative orders to require certain plaintiffs to perform specified tasks beyond mere cessation of the proscribed practice. Four types of affirmative orders are currently being issued: (1) alteration of the sales contracts [Household Sewing Mach. Co.; (1967-1970 Transfer Binder) CCH Trade Reg. Rep. No. 18,882 (FTC 1969)], (2) corrective advertising--negative disclosures [ITT Continental Baking Co., 3 CCH

Trade Reg. Rep. No. 19,681 (FTC 1971)], (3) corrective advertising--confessions [Ocean Spray Cranberries, Inc., 3 CCH Trade Reg. Rep. No. 19,477 (FTC 1971)], and (4) orders for restitution [Windsor Distributing Co. v. Federal Trade Commission, 437 F. 2d. 443 (3rd. Cir. 1971)]. These actions which have come from the desire for innovativeness in the Commission rather than from legislation extending its authority, are expressive of the Federal Trade Commission's desire to expand the scope of its activities.[49]

The Office of Consumer Affairs

The President's Special Advisor on Consumer Affairs is perhaps the best publicized office with responsibility to champion the public's interest. The Committee on Consumer Interest, headed by the President's Special Advisor on Consumer Affairs, and created by executive order January, 1964, was given little authority to protect the interests of consumers: the office is essentially a focal point for consumer complaints. The petitions which flow into this office are not acted upon by this group beyond attempt towards mediation--they are either passed on to appropriate Federal agencies with enforcement responsibility in matters of clear violation of law or forwarded to the particular business involved with a cover form.

The executive order which created the Committee on Consumer Interest[50] charged this group with the

responsibility of coordinating Federal consumer programs and advising the President on questions of policy relating to consumer affairs. The Office likewise attempts to act as a liaison between Federal agencies, the business environment, and the consuming public. In addition, the Committee is instructed by the executive order to work closely with the states and local agencies in designing effective consumer protection programs. The Office of Consumer Affairs has just recently been shifted to the Department of Health, Education and Welfare; yet it appears that its duties and priorities will remain unchanged even though its director will now report to a Cabinet Officer instead of the President.[51]

The Food and Drug Administration

The Food and Drug Administration, also housed in the Department of Health, Education and Welfare, is directly involved in protecting the consumer's interest. Besides ascertaining the safety and efficacy of certain food, drugs, devices and cosmetics, the Food and Drug Administration's powers pertaining to the marketing of products lean heavily in the direction of mislabeling and the requirement of truthful disclosure of ingredients and quantity. It is empowered to restrict untruthful advertising on the labels of merchandise and some point of purchase materials. The Food and Drug Administration's jurisdiction overlaps that of the Federal Trade Commission,

which controls the advertising of most products regulated by the Food and Drug Administration. In a 1971 accord between the two agencies this duplication of responsibility was reconciled. The Food and Drug Administration assumed primary enforcement responsibility for the labeling of food, drugs, devices and cosmetics in interstate trade as well as regulating false and misleading advertising of prescription drugs, while the Federal Trade Commission agreed to police the advertising of food, non-prescription drugs, devices, and cosmetics.[52]

In actuality, the Food and Drug Administration appears to be most concerned about the safety of those type products for which it is responsible. Its administration is geared more towards protecting the public's health than towards testing the efficacy of non-prescription drugs or adjudging the veracity of labels.[53] Yet the Food and Drug Administration is expanding its activities by issuing guidelines concerning the advertising of prescription drugs and enforcement of its labeling requirements as evidenced by the proceedings in the Label, Inc. v. Edwards case.[54]

The Federal Communications Commission

The Federal Communications Commission is given the power to issue licenses to operators of broadcasting media. Through this power of granting or revoking licenses, it regulates the broadcaster rather than the

questionable advertiser. The Federal Communications Commission's rules specifically bar lotteries, fraud, and obscenity from the airways. The Federal Communications Commission's action, which is most important to this study, is the refusal to renew licenses to stations which knowingly carry false and misleading advertising and sales promotional messages. The Federal Communications Commission also works in close liaison with other Federal agencies so as to inform the broadcasting industry of advertisements and sales schemes which have been banned or are highly questionable.[55]

The Federal Alcohol and Tobacco Tax Unit

The Alcohol and Tobacco Tax Unit, a division of the Bureau of Internal Revenue, holds the same type of threat over the brewers of alcoholic beverages as does the Federal Communications Commission over its broadcasters--revocation of licenses; only here they deal directly with the advertiser in interstate commerce. However, the Federal Alcohol and Tobacco Tax Unit's authority extends beyond the threat of revocation of a brewer's license. It is specifically charged to "prevent deception of the consumer with respect to the product advertised and to prohibit statements that are disparaging of a competitor's product or are false, misleading, obscene, or indecent."[56]

The United States Postal Service

The United States Postal Service is also involved in protecting the consumer from fraudulent schemes involving the mail or use of the mails to deliver fraudulent advertisements. The Postmaster General is directed by Congress to restrict

> Any person or company [that] is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, . . .[57]

The postal department is armed with both criminal and civil power to proceed against mail fraud. It has found that many of its most persistent problems are in the food and drug field and are principally handled through inter-agency cooperation.[58]

The Securities and Exchange Commission

The Securities and Exchange Commission is vested with the responsibility of assuring truthfulness in advertising and oral statements concerning the sale of registered securities. The Securities and Exchange Act of 1934 makes it

> . . . unlawful for any person, directly or indirectly, by the use of the mails or any means of instrumentality of interstate commerce, or of any facility of the National Securities Exchange ... to make, regarding any security registered on the national securities exchange, for the purpose of inducing purchase or sale of such

> security, any statement which was at the time and in the light of circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false and misleading.[59]

This Act has been interpreted very broadly to allow the Securities and Exchange Commission wide latitude in ensuring truthful, accurate, and adequate advertising of securities sold in interstate commerce. Section 18 of the 1934 Act provides that persons who relied on false representations in the purchase or sale of securities are entitled to sue in a court of equity for the recovery of actual damages, attorney's fees, and court costs.

The Civil Aeronautics Board

The Civil Aeronautics Board is also involved in the regulation of advertising, specifically, the sale of airline services. Section 411 of the Federal Aviation Act of 1958 places responsibility upon the Civil Aeronautics Board to investigate upon its own initiative or upon complaint and "determine whether any air carrier, foreign air carrier, or ticket agent has been engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."[60] This provision gives the Civil Aeronautics Board rather strict control over the special promotions, contests and selling efforts of the airlines or their agents and allows the Civil Aeronautics Board to remedy problem situations by the removal of certificates as a last resort.

The Federal Deposit Insurance Corporation

Advertising and sales promotional efforts by the federally chartered savings and loan associations and by those state-chartered banks whose accounts are insured by the Federal Deposit Insurance Corporation are controlled by the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation respectively. Their basic power to insure banks and savings and loan associations has been interpreted to extend control over their members' advertising and promotional policy when a detrimental effect on the public is suspected. These two agencies attempt to establish advertising codes and trade practice rules for the banks and savings institutions to follow.

Other Federal Agencies

The other thirteen Federal agencies which exercise some measure of influence over advertising and selling merchandise in interstate commerce are listed below:

1. The Agricultural Department controls false advertising and statements concerning meat products, seeds, and agricultural supplies such as fertilizers and insecticides.

2. The Department of Commerce is involved in the advertising and representations of products which are in contravention with the guidelines established by the Bureau of Standards.

3. The Customs Bureau is enjoined to regulate certain claims made about the origin, quality, and specific properties of imported goods.

4. The Defense Department is included on this list because it limits and controls advertising by its prime contractors, especially when they make exaggerated claims of their involvement in special government projects.

5. The Farm Credit Administration controls fraudulent advertising concerning the provisions or the attainment of Federal farm loans.

6. The Federal Power Commission is given the responsibility of overseeing the advertising of public utilities in respect to their rates and claims about their service.

7. The Department of Interior has control over the advertising of lands within its jurisdiction as well as the advertising and sale of Indian arts and crafts.

8. The Internal Revenue Service exercises indirect influence through adjudging the deductability of certain advertising expense claims.

9. The Interstate Commerce Commission exerts control over carriers' advertising of rates and services, and false and misleading statements in relation to the securities issued by the regulated carriers.

10. The Department of Labor is involved in regulating advertising by employers and labor unions in instances where they are involved in labor relations disputes.

11. The Narcotics Bureau exerts strong control over the advertising of products containing narcotics.

12. The Patent Office establishes rules of conduct and governs advertising by patent agents and attorneys.

13. The Treasury Department has restrictions over the use of money, coins, stamps, bonds, and the like in the presentation of an advertisement.

## Boundaries of Federal Jurisdiction

In the protection of consumers in the marketplace there are broad questions as to who has privy--Federal, state, or local governmental units. Indeed, all share in some way the burden of protecting the consumer's interest; yet Congress is vested with the authority "To regulate Commerce with foreign nations and among the several States and with the Indian Tribes."[61] This section of the Constitution, often referred to as the commerce clause, provides the basis of authority for the Federal government to regulate affairs of business among the states, possessions of the United States, and foreign nations.

Judicial interpretations of the commerce clause have over the years expanded the meaning of the term, and

consequently the jurisdiction of the Federal government in its ability to regulate trade among the several states. Table I, presented on the next page, traces the evolution of Supreme Court decisions with respect to the commerce clause. The last two benchmark cases cited are particularly significant in the context of the boundaries of interstate commerce. In Wickard V. Fillburn,[62] the Supreme Court expanded the concept of interstate commerce to include products which are intended for consumption solely within a state where their consumption has an economic impact on interstate commerce. The Katzenback V. McClung[63] case extended jurisdiction even further in the application of the 1964 Civil Rights Act. The Supreme Court upheld the lower court's decision that Ollie's Barbeque purchased meat and supplies which originated outside the state and were therefore considered within the flow of commerce. Thus it was subject to Federal jurisdiction.

The expansion of the court's interpretation of the interstate commerce clause, in effect, gives the Congress carte blanche authority to regulate practically any business organization and could, conceptually, invalidate any state laws which conflict with legislation it might enact. Even though the Congress has the power to regulate interstate commerce in the broadest sense in addition to the responsibility to protect the public interest, it has vacillated in granting this broad

Table I

Evolution of Major Supreme Court Decisions with Respect to Interstate Commerce

| | |
|---|---|
| 1787 - United States Constitution Art. 1, Sec. 8 | - Power to regulate commerce among the several states |
| 1803 - Marbury v. Madison 1 Cranch 136, 2 L. Ed. 60 | - Established Constitution as supreme law of the land |
| 1819 - McCulloch v. Maryland 4 Wheaton 316, 421, 423, 4 L. Ed. 579 | - State laws which conflict with Constitutional powers are null and void |
| 1824 - Gibbons v. Odgen 9 Wheaton 137, 6 L. Ed. 23 | - Free intercourse between states in respect to interstate trade |
| 1851 - Cooley v. Board of Wardens at Port of Philadelphia 12 Howard 299, 13 L. Ed. 996 | - Defines power of the state to regulate commerce as long as it does not conflict with Constitutional powers |
| 1886 - Coe v. Errol 6 L. Ed. 475 | - Boundaries of interstate commerce begin with the movement of the common carrier |
| 1935 - Schecther Poultry v. United States 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1560 | - Defines where interstate commerce ends--where intra- and interstate goods mix and lose identity |
| 1936 - Carter v. Carter Coal Co. 298 U. S. 238, 56 S. Ct. 855, 8 L. Ed. 1160 | - Interstate commerce involves a change in place; production is a change in form and thus not regulatable as interstate commerce |
| 1937 - NLRB v. Jones & Laughlin Steel Corp. 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893 | - Production defined as interstate commerce if activities directly affect interstate commerce |
| 1942 - Wickard v. Filburn 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed. 122 | - Makes no difference whether goods are ever intended for interstate commerce if the effect on the economic balance of interstate trade is felt. |
| 1964 - Katzenbach v. McClung 379 U. S. 294, 85 S. Ct. 377, 13 L. Ed. 2d. 290 | - Suppliers in interstate commerce, therefore firm is likewise in the flow of commerce |

Source: Grant M. Davis, "The Commerce Clause and Its Interpretation" (Unpublished paper, University of Arkansas, 1972).

power to regulatory agencies which it has created. The specific wording of the legislative enactment establishing an agency and defining the limits of its authority is very important.

The two primary Federal regulatory agencies pertaining to the particular area of consumer protection under study, the Federal Trade Commission and the Food and Drug Administration, are delimited in their authority to regulate interstate concerns. The Food and Drug Administration is specifically charged to prevent "The introduction or delivery into interstate commerce any food, drug, device, or cosmetic that is adulterated or misbranded."[64] The Federal Trade Commission's authority emerges from Section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act of 1938 which expressly states that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."[65] Both pieces of legislation expressly limit their respective agencies to a narrow interpretation of interstate commerce by specifically stating "into" or "in interstate commerce" rather than granting them authority to regulate matters "affecting commerce" as under the Sherman Act or the Act creating the Interstate Commerce Commission.

Judicial interpretation of the United States v. Sanders case[66] in 1952 expanded the Food and Drug Administration's authority to regulate firms

not actually or directly involved in interstate traffic of goods but dealing with other firms whose goods would subsequently flow into interstate commerce. Understandably, each particular case has its own special circumstances; yet the Sanders case upheld the Food and Drug Administration's jurisdiction over a firm whose primary dealings were in intrastate commerce. From this precedent, the Food and Drug Administration may push even further in judicial interpretations of the introduction of food, drugs, etc. . . . "into" interstate commerce.

The Federal Trade Commission, deemed the most important of the twenty-one above mentioned Federal agencies involved in consumer protection,[67] appears to be more restricted in its authority than even the Food and Drug Administration. When Congress granted the Federal Trade Commission its authority and when the Federal Trade Commission Act was expanded in 1938, there was substantial debate whether the Commission should be empowered to regulate matter "affecting" interstate commerce or those matters solely "in" interstate commerce.[68] Its authority to regulate interstate affairs extends only to matters <u>in</u> interstate commerce. Even though Congress possesses the power to grant the Federal Trade Commission wider regulatory control, it chose at the time of its enactment and revision specifically to limit its authority.

The landmark case pertaining to the boundaries of authority of the Federal Trade Commission is Federal Trade Commission v. Bunte Bros (1941).[69] In this case the Supreme Court found the difference in wording of the Federal Trade Commission Act to be very important. The Supreme Court maintained that the specific wording of the Act, as amended, indeed limited the Federal Trade Commission to matters clearly in interstate commerce. The defendant in the case, Bunte Brothers Candy Company, was operating solely within the boundaries of one state (Illinois); yet it was competing with an interstate firm by utilizing practices deemed by the Federal Trade Commission to be unfair methods of competition. The Court ruled, however, that the Federal Trade Commission did not have jurisdiction. "As the words 'in commerce among the several states' modify 'unfair or deceptive acts' in the wording of the Federal Trade Commission Act, the Commission may not regulate an unfair act in interstate commerce because its perpetrator deals in intrastate commerce or competes with interstate firms."[70] The late Justice Frankfurter, in the majority opinion on the Bunte Brothers case, stated that

> The construction of Section 5 urged by the Commission would . . . give a Federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local laws.[71]

On the basis of the Bunte Bros. decision which still stands uncontested in court, a firm servicing a one-state

market is immune to regulation by the Federal Trade Commission.

A past chairman of the Federal Trade Commission, Miles Kirkpatrick, at the time he directed the American Bar Association's study of the Federal Trade Commission, concurred with the opinion of the study group that the Federal Trade Commission has exaggerated its jurisdictional problems and could, if it were diligent in its task, expand its scope of activities in the area of unfair and deceptive practices.[72] Others contend, however, that because the Commission has avoided a precise definition of its jurisdiction since the landmark case in 1941 it has maintained its ability to bluff firms into voluntary compliance in cases of questionable jurisdiction. They feel that the likelihood is great that, if a test case were pushed, the Bunte Bros. decision would be upheld.[73] Finally, it is doubtful that even if the Bunte Bros. decision is reversed, that the Federal Trade Commission possesses the ability and resources to give adequate consideration to those cases in its expanded domain.*

President Nixon, in a 1969 address to Congress concerning the protection of the interests of the consumer, attempted to rectify the jurisdictional question of the Federal Trade Commission by asking Congress to amend the Federal Trade Commission Act explicitly to grant the

*Jack E. Kahn, Assistant Regional Director of the Federal Trade Commission, Atlanta office, personal interview, March 23, 1973.

Commission control over matters affecting commerce and to increase the Federal Trade Commission's funding so that it might fulfill a broader protection role.[74] Congress has chosen to ignore several Presidential requests for a change in the FTC's jurisdictional powers. It has refused to enact such legislative change amid growing public pressure for expansion of consumer protection activities on the part of government. By Congressional inaction and the apparent unwillingness of the Federal Trade Commission to test the Bunte Bros. decision in the context of current times, it appears that the Commission must decisively prove a firm to be in interstate commerce before it has any legal jurisdiction over the firm.

## Degree of State Involvement

From the above discussion it may seem apparent that the obvious solution to the question of jurisdiction and problems involved in providing consumer protection is to expand the scope of activities of the Federal agencies which administer to the public's interest. From the Presidential viewpoint, at least, it represents a step in the direction of providing better protection to the consuming public from unscrupulous sellers. President Nixon and the past three Chairmen of the Federal Trade Commission have made public their desire to expand the jurisdictional authority of the Federal Trade Commission. These requests were not directed toward the goal of simply expanding Federal bureauracy; rather, the Commission's desire was to

eliminate the time-consuming and costly procedural task of proving that a firm operated in interstate commerce before the Federal Trade Commission can act in the public's behalf. It is not the intent of the Federal Trade Commission or its jurisdictional advocates to police consumer matters on the local level.*

As far back as 1966, former Chairman Dixon strongly encouraged states to enact laws which were modeled after the Federal Trade Commission Act to prevent consumer deception and unfair competitive practices.[75] Later, Chairman Kirkpatrick (recently replaced by Lewis A. Engman) promoted the same view by appointing a special officer to direct Federal-state cooperation and to assist the states in drafting legislation to bolster consumer protection. In an address before the Council of State Governments, Chairman Kirkpatrick encouraged the states to take business away from the Federal Trade Commission and, in so doing, allow more time for the Federal Trade Commission to concentrate on matters of regional and national importance.[76] The present Chairman, Lewis A. Engman, supports this type action by his continued emphasis on the Office of Federal-State Cooperation and his recognition that the Federal Trade Commission cannot effectively police consumer transaction problems at the local level.**

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*Kahn, personal interview.

**Gale P. Gotschall, Council for Federal-State Cooperation, Federal Trade Commission, telephone interview, March 27, 1972.

It appears that the Federal Trade Commission has adopted the logic of Ira Millstein when he earlier advised that

> The Commission should occupy a primus inter pares role with respect to the state agencies; encouraging passage of needed legislation, offering advice and possibly assistance in litigation and the formulation of guides; becoming a focal point of coordination among state agencies to avoid inconsistencies; referring complaints of an essentially local nature to state agencies; and in general, developing programs designed to urge and aid state agencies to adopt a rational but consistent approach to local advertising, thereby relieving the Commission of a host of essentially local matters.[77]

The states are in an excellent position and can legally assist the Federal agencies in their task of consumer protection. Even though there are many areas of advertising and sales practices which are subject to possible concurrent Federal and state control, the question of preemption has historically not afforded much trouble.[78] There is little jurisdictional history in this area of preemption; yet it seems unlikely that Congress in creating Federal agencies to protect the public interest would preempt the entire area of consumer protection from control by other levels of government. Indeed, requests such as those made by the various chairmen of the Federal Trade Commission for state aid seem to disavow this idea.

By volume, the vast majcrity of consumer transaction problems are local in character and origin.[79] Even if the questions of jurisdiction and staffing and

funding of the Federal Trade Commission were resolved, there is good cause to consider a state in the "business" of consumer protection. The mere fact that the boundaries of Federal jurisdiction are enlarged may well cause the states to react unfavorably to encroachment on their assumed responsibilities. The 1969 study of the Federal Trade Commission by the American Bar Association concluded that ". . . many consumer fraud schemes are local in origin and effect and preferably should be dealt with by local enforcement units rather than a Washington-based Federal Bureauracy."[80] Gale Gotschall, Chief Council for Federal-State Cooperation at the Federal Trade Commission, suggests that the states can correct unfair and deceptive practices within their boundaries more cheaply than by "shipping" local problems to Washington.[81] Protection at the state level not only provides proximity to consumer abuse but also affords the possibility for quicker detection and reaction to problems related to consumer protection.

The Constitution of the United States in defining the bounds of Congressional authority establishes Federal law as supreme. From this basis, the Federal government by its past legislative and judicial action has declared the leadership role in providing the basis for consumer protection. The states cannot encroach upon this authority unless Federal law is repealed or authority is given-up by administrative default. With the majority of consumer

abuses being suffered at the local level beyond present jurisdiction of federal agencies, someone must act. State-level action seems most appropriate, as contrasted to strictly local agencies, because of the need for widespread authority and uniform enforcement throughout the state. A state agency can serve as a focal point for consumer complaints and thus avoid duplication of efforts in those instances where abuses are widespread throughout the state. It can also prevent fraudulent vendors from moving to another locality within a state to avoid prosecution. For best results, an effective symbiosis could exist between Federal and state agencies, each operating as an information and referral system to the other in matters not within their scope of activities. This situation would allow federal agencies more time to address themselves to regional or national matters leaving the states to initiate action against fraudulent sellers operating within their boundaries. Strictly local agencies can easily fit within this system by acting as a "feeder" for problems too large for them to handle and by contributing to the banks of knowledge concerning fraudulent operators.

The various states have viewed the responsibility for consumer protection differently. Many, which have reacted to the recent consumerist movement, have attempted to update their approach to afford their citizens protection from unscrupulous merchants; others have taken a rather

lackadaisical attitude toward extending protection over those matters which are local (intrastate) in character. As mentioned earlier, Alabama falls into this latter category. The following chapter, which deals with the present legislative environment in Alabama, presents the legal and administrative basis for consumer protection presently in existence.

NOTES

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## CHAPTER III

## PRESENT STATUS OF CONSUMER PROTECTION IN ALABAMA

An examination of the Code of Alabama indicates a basic legal structure common to most states. Legal actions can be categorized into three main types or divisions--those having to do with criminal law; those concerning civil law; and those cases in equity. Laws pertaining to false or fraudulent advertising and sales practices can be found within the three divisions of the legal framework, each area having a specific intent or purpose. Generally, the nature of the offense, its effect on the public, and the origin of the complaint dictate the type of action(s) which will be brought to court.

### Avenues of Legal Action

Criminal law in general represents that branch or division of the law which defines crimes against the public or the sovereign state. Prohibitory in nature, it seeks to deter injury to the public at large through direct means of punishment. Criminal law does not seek to redress the specific wrong done to individuals; rather it is administered to prevent further injury to the public.[1] Criminal prosecution by the sovereign state does not bar

an injured party from bringing individual suit for redress of a wrong he has suffered at the hands of a named defendant.

Civil law basically defines the rights of individuals in society. It deals with actions and "disputes between persons in their private capacity--whether such matters relate to the persons of the parties, or to their personal or real property."[2] Civil law "supports action which has for its object the recovery of private or civil rights or compensation for their infraction."[3] Civil actions may be initiated by a single injured party or by an agent, such as the attorney general, in behalf of injured parties for restorative, rather than for punitive, purposes.

Cases in equity came into use from the ancient English court of chancery.[4] Courts of equity are not inquisitorial but remedial, such as those of civil law. It is not their function to assist in creating causes of action where none are specifically alleged: they exist for the correction of those particular situations where the law is deficient.[5] Suits in equity give protection to individuals where adequate remedy cannot be had at law.[6] Equity is often defined as "the 'conscience' of the law . . . and leaves the presiding judge reasonably free to order preventive measures--usually in the form of a writ, such as an injunction, or restraining order, designed to afford a remedy not otherwise obtainable, and traditionally given upon showing of peril."[7]

The common law is often intermixed with the statutory law in establishing a guideline for judicial action. "Common law is judge made, bench made, law rather than a fixed body of definite rules such as the modern civil law codes."[8] It is based on precedents set down in the past judgment of cases and "includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority on any express and positive declarations of the will of the legislature."[9] The common law, as such, is uncodified; yet the case-precedents which embody the "essence" of the common law are used along with statutory law in arriving at a judicial decision.

## Existing Legal Environment

Alabama, like most other states, seems to have developed haphazardly a number of specific prohibitions concerning false and misleading advertising and sales practices during its legislative history. The organization of the Code of Alabama follows the general reference system adopted nationwide, thus, citing specific type practices produces a conglomeration of titles and sections. The following examination of the legal environment categorizes the various laws affecting the advertising and sale of goods in Alabama on the basis of the three major types of remedial actions outlined above.

Criminal Action

Under the criminal section of the Code of Alabama are found the express prohibitions against advertising in certain professions and the making of certain claims pertaining to special classes of commodities.[10] The law specifically forbids the use of obscenity in any advertisement, handbill, poster, etc. . . . and makes such violation a misdemeanor. The use of any advertising materials which appear to be a check draft or other valuable paper is expressedly prohibited. Section 212 under Title 14 requires that advertising material appearing in newspapers, magazines, and other periodicals be so marked or plainly evident. The advertising of products concerning VD, impotency, and prostatic troubles is likewise in violation of the criminal code. Physicians and chiropodist are subject to revocation of their license and subsequent fine and/or imprisonment for engaging in the advertising of their services beyond the office sign and standard directory listing.[11] More specific sections of the Code prohibit false and misleading statements in the advertising of mellorine, poultry products, optometry supplies, insurance, and lending institutions, particularly the small loan company. These latter regulations appear to have arisen to protect special interests within the state or were passed to curb flagrant abuse in the advertising of the specified commodity.

Also the criminal statutes pertaining to fraud generally are quite relevant to this study. Section 209 of Title 14 of the Code of Alabama states that--"Any person, who, by false pretense or token, and with the intent to injure or defraud, obtains from another any money or other personal property, shall on conviction, be punished, as if he had stolen it." The seriousness of violation of this act (whether a misdemeanor or felony) would depend upon the valuation of the object of fraud.

Under the above section of the criminal code, it is necessary to prove intent to defraud, which is often quite difficult. The falsity of the representation must be known by the defendant and it must be proved that the accused made such material misrepresentation with the intent to defraud.[12] Statements generally defined as trade puffing or opinions as to fact or merely promises on the part of the accused of something to be done in the future[14] do not constitute violation of this section. In Eaton v. State, it was shown that misrepresentation by action or deed ". . . unaccompanied by the employment of false representation of fact by word . . . although sufficient to warrant a conclusion reached by the party parting with the thing of value, it is not sufficient to bring the case within the statute."[15]

Even though Section 209 of the criminal code can be applied equally to both parties in a transaction,

examination of the appellate and supreme court cases in the state of Alabama back to 1911 (construing section 209 as the point of law) shows prosecution favoring the vendor in all situations where merchant and consumer were at odds. The state had no bad check law within the criminal statutes prior to 1951 and the majority of false representation cases appear to have been initiated to control this type practice.

Section 210 of the criminal code pertains to the obtainment of services of another or the use of personal property through false pretense, representation, or token. Its applications and case precedents are construed exactly as those of the preceding section. The penalty assessed, however, is more precise--persons convicted of violating this statute can be punished by a fine up to five hundred dollars. There is no provision for imprisonment for this section as there is for theft prosecuted through section 209.

If a formal, written contract is involved in the misrepresentation, then the complaining party may bring separate action under section 213 of the Code. Again, the plaintiff must show proof that the defendant clearly intended to injure or defraud when the defendant obtained the plaintiff's signature to any written instrument.[16] The use of false representation or token in the obtainment of a signature to a contract is

interpreted as forgery in this section. Also the defendant is punished as if he had forged the instrument--imprisonment for not less than one nor more more than twenty years.

The Printers' Ink model statute, which was adopted by the state legislature in 1915, was amended in 1931. Prior to its amendment, the court required that knowledge of the falsity or untruth in an advertisement must be proved before action could be taken. The deletion of "knowledge of the untruth" from this section separates it from the other provisions concerning fraud generally. The model statute, section 211, reads as follows:

> Untrue Advertising Prohibited--(a) No person, firm corporation or association shall, with the intent to sell or in anywise dispose of real estate, merchandise, securities, services, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding real estate, merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading. (b) It shall be deemed deceptive advertising, within the meaning of this section, for any person, firm or corporation, engaged in the business of buying or selling new or second-hand furs, wearing apparel, jewelry, furniture,

pianos, phonographs, or other musical instruments, motor vehicles, stocks, or generally any form of property, real, personal or mixed, or in the business of furnishing any kind of service or investment, to advertise such articles, property or service for sale, in any manner indicating that the sale is being made by a private party or householder not engaged in such business. And every such firm, corporation or association, engaged in any such business, in advertising goods, property or service for sale, shall affirmatively and unmistakably indicate and state that the seller is a business concern and not a private party. (c) Any person, firm, corporation or association engaged in any business mentioned in subsection (b), or any other kind of business, whether conducting such business in a store, business block, residence or other building, shall at all times keep a conspicuous sign posted on the outside of his establishment and another conspicuous sign in the salesroom which sign shall clearly state the name of the association, corporation or individual who actually owns said merchandise, property or service which are being offered to the public and not the name of any other person; provided, however, that the exterior sign shall not be required where the seller has no control over the exterior or the premises where such business is conducted. (d) No person, firm, corporation or association shall, with the intent to sell, or increase the consumption thereof, or create an interest therein, make publish, disseminate, circulate, or place before the public in this state, or cause, directly or indirectly to be made, published, disseminated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular or pamphlet, or in any other manner, an advertisement of any sort regarding articles of food, which advertisement contains any assertion, representation or statement which is untrue, deceptive or misleading. (e) It shall be unlawful to advertise any dairy or other food product which is of a grade or quality inferior to or less valuable portion has been removed, without plainly and conspicuously stating that the article advertised is below and inferior to the usual and ordinary grade. (f) Any person, firm, corporation or association or the agent or servant of any other person, firm, corporation or association violating any provisions of this section shall be guilty of a

> misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars nor more than one thousand dollars, or be imprisoned in the county jail not more than sixty days, or by both such fine and imprisonment; and each sale, advertisement or representation in contravention of this section shall be deemed a distinct offense and shall subject the offender to such punishment.

This section gives wide latitude for action against untrue, deceptive or misleading advertising; however, case precedents which specifically define the boundaries of deceptive and misleading statements have yet to be set within this state. The interpretations of the Federal Trade Commission as to what constitutes untrue, deceptive or misleading statements are taken as guidelines. The construction of this section of the Code, specifically part (a), indicates that it intends punitive action to be brought against those persons, firms, corporations or associations who receive material gain from the effects of a "false" advertisement; yet, judicial decisions seem to rest upon the intent of the defendant rather than upon its effect on the consuming public. Thus, rather than utilizing a rigid interpretation of the model statute, the courts have followed a pattern of prosecution similar to that relating to false pretenses, even in light of the 1931 amendment to this act. This pattern perhaps stems from the fact that a crime (and thus criminal prosecution) is defined in the eyes of the law as consisting of both the act and an intent to act.[17]

Civil Action

The civil law, which defines the basic rights of individuals in society, likewise affords protection to the defrauded consumer. Under civil actions an individual's rights are more loosely defined than the prohibitions of the criminal code. Moreover, the courts are given a freer hand in defining the bounds of protection of an individual's rights. The Uniform Commercial Code, which comprises a part of the civil codes, and which became effective within the boundaries of Alabama on December 31, 1966, generally outlines the propriety of business dealings.

In those instances where a formal contract is utilized in fraudulent business dealings, the injured party might seek satisfaction through the execution of the unconscionable contract or clause provision, if such unconscionability is present in the formal agreement. This clause specifically grants the court the right to void a contract or limit its application if it finds the contract "to have been unconscionable at the time it was made."[18] The basic test of unconscionability is whether the clauses contained in the written instrument are so one-sided as to unduly curtail the rights of the signee in light of the general trade provisions of the industry or area of operation.[19] Obviously, this section of the Code is subject to a great deal of latitude in court interpretation as it depends upon how

the court determines what the general trade provisions are within a particular industry. Trade practices themselves could well be traditionally discriminating against the purchaser of a generic product. A parallel might be found in the automobile industry where the traditional express warranty given buyers is said to limit severely the responsibility of the seller.

The unconscionability section of the Uniform Commercial Code is limited in the protection afforded because it fails "to define or differentiate between procedural and substantive unconscionability."[20] In short, the proscribed behavior during the bargaining process is not admissible as evidence (procedural evidence); it is the unconscionable provisions of the written contract (substantive evidence) alone which is at issue in this section.

Civil actions may also be instituted by the injured party where no formal contract exists under the provisions of the law concerning fraud, misrepresentation, deceit, and supression of the truth. Section 107 of Title 7 of the Code of Alabama, which defines civil remedies and procedures, states that--"Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action." This section, which essentially clarifies the injured party's right to action, requires proof of actual damage to the plaintiff before relief or restitution is given.

Section 108 defines legal fraud--"Misrepresentations of a material fact, made willfully to deceive, or recklessly without knowledge, and acted upon by the opposite party, or if made by mistake and innocently, and acted upon by the opposite party, constitutes legal fraud." In establishing a right to action the complaining party must show that the misrepresentation which initiated action was indeed significant.[21] As in criminal law, trade puffing or mere opinion given by the defendant in the bargaining process does not constitute misrepresentation of a material fact.[22] However, if the defendant is deemed to be giving an expert opinion by the nature of his particular knowledge or profession, his opinion, which is considered to be a material fact, comes within the provision of fraud.[23]

Even though fraud, as defined in this section, can be achieved through "willful action or by mistake and/or lack of knowledge" or by "mistake and innocently," action is confined to recovery of actual damages and/or recision of the contract in part or all. However, if it can be proved that the seller acted with intent to deceive through malicious, gross, or oppressive action, punitive damages may be awarded.[24]

This statute makes it clear that the intent to deceive need not be proved for satisfaction to be obtained by the injured party; nor is the court interested in the fact that the defendant has acted in good faith. In

Jordan and Sons v. Pickett, the court stated that the law imposes the burden of ascertaining the truth or veracity of a material statement upon the maker; also, the law demands, in the case of conscious omission of important facts, that the misrepresentation be corrected or satisfaction given.

Supression of the truth where "the obligation to communicate material facts may arise from the confidential relations of the parties, or from the particular circumstances of the case," is dealt with specifically in yet another section of the law of civil remedies (Title 7, Section 109). In the Metropolitan Life Insurance Co. v. James case, the court stated that

> This statute is declaratory of the common law. In dealings between persons standing in confidential relations or positions of trust, the law imposes the obligation on the part of the one to safeguard the interests of the other with the same fidelity he safeguards his own, and charges him with knowledge of such duty. Withholding facts, material to be known, is a breach of legal duty, regardless of intent to deceive, as is a legal fraud.[26]

In Mudd v. Lanier,[27] the court ruled that, where both parties are reasonably intelligent and dealing at arm's length, no duty to disclose material facts exists where information is not requested. In this sense, silence does not constitute fraud under this section of the Code; yet where a fiduciary relationship exists, the party is obliged to communicate the material facts or be in violation of this section.

The relation of trust and confidence in the sale of automobiles is limited to the need for the seller to communicate to the buyer information as to the physical condition of the car, not its "true" value or worth or other similar information.[28] Confidential relations, likewise, exist between most professionals in their business dealings. This relationship also extends into banking, where the bank is responsible to its depositors when it acts in an advisory capacity.[29] No confidential relationship is said to exist among all parties bargaining at arm's length.[30] This statute (Title 7, Section 109) in reverse, charges individuals to exact positive statements and assurances from those with whom they deal to avoid the loophole of omission or suppression of the truth where a confidential relationship does not exist; otherwise--caveat emptor.

Section 112 of Title 7 of the Code of Alabama is basically a definitional section and defines deceit as

> The suggestion, as a fact, of that which is not true, by one who does not believe it is true; the assertation, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, a promise, made without any intention of performing it.

This section is often cited by the plaintiff in conjunction with other specific sections concerning fraud or deceit in bringing civil action against a named defendant.

The preceding section defined the right to action in the case of deceit as "one who willfully deceives another with the intent to induce him to alter his position to his injury, or risk." The individual found guilty of deceit is liable to any damages on the part of the deceived party as well as the right to recovery of actual injury suffered or recision or modification of the contractual relationship.

Deceit as defined in the civil remedies section of the Code differs substantially from fraud generally or the legal definition of misrepresentation and supression of the truth. The principal difference relies on the necessity of proving willful misrepresentation and the intent to deceive. Section 110 of Title 7 states that

> Willful misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to knowledge of a falsehood.

As in other sections reviewed earlier, the facts which were misrepresented must be material and acted upon by the injured party to constitute violation of this section. It is plainly stated in this section that it must be proved that the defendant intended to mislead and injure another by his action; scienter must be present. The benchmark

case on this point is Hockinsmith v. Winton[31] where the court stated that the proof of bad faith is absolutely essential for relief to be granted under this act. In the same case, the court went further in saying that "expressions of opinions will not support an action of deceit, unless they are knowingly false or made with intent to deceive and are so acted upon."[32]

Under this section, punitive, as well as restorative, remedies are available. As pointed out in Kilby Locomotive & Machine Works v. Lacey & Son, persons injured by willful misrepresentation or deceit are "entitled to all the damages within the contemplation of the parties, or which are necessary, or natural and proximate consequences of the fraud."[33] Nor is the injured party required to rescind the transaction: he may elect to retain that which he has received and seek to recover such damages as he can.[34] Promises for the completion or fulfillment of certain actions at a future point in time do not constitute violation of this section unless it can be proved that there was no intent of fulfilling this promise at the time it was made.[35] To say the least, this situation would be most difficult to prove in a court of law.

In all cases of deceit, misrepresentation, and supression of the truth there is the common necessity to prove that the facts must be material to the case in point and must be acted upon by the injured party, not

introduced as an afterthought. Likewise, it must be shown that the "party acting upon deception must be ignorant of the falsity of the misrepresentation made or the opinions expressed by the other party."[36] This judicial opinion indicates that the defense would have grounds for acquittal if it could be shown that the injured party believed, or had reason to believe, that the material misrepresentation was untrue. In such instances the claimant would have acted upon some material fact known to be false and he would have no grounds for action--caveat emptor.

Civil remedies relative to consumer protection are also found in other sections of the Code. Of particular interest in this study is the right of civil action granted to persons injured by insurance frauds. The rights of citizens are protected through administrative action initiated by the Superintendent of Insurance; yet individuals also have the right to pursue civil remedies for injuries spelled out in the law regulating insurance firms. Section 18 of Title 28 of the Alabama Code prohibits fraudulent advertising generally and the posing as an insurance firm unless licensed to do business within the state. Section 26 makes it unlawful for insurance firms or their agents to issue statements, either verbal or written, which misrepresent the terms of their policies. The Federal Trade Commission's "model code" is found under the laws regulating insurance firms within this

state. It is modified somewhat to fit its application for specialized use. The state outlaws "unfair or deceptive methods of competition or an unfair or deceptive act or practice in the business of insurance."[37] It is the responsibility of the Superintendent of Insurance to ascertain what constitutes unfair methods of competition or unfair or deceptive acts. The primary guidelines, although not mandatory, are the Federal Trade Commission's rulings defining the bounds of the above terms.

Action in Equity

It was mentioned earlier that the public turns to equity proceedings when adequate remedies are not available at law. Equity, which exists as a holdover from the courts of chancery, does not give the courts many codified proscriptions to follow in handling the business of justice. Shuman and West explain a person's reason for turning to equity proceedings:

> In actions at law, if successful, the plaintiff recovers a judgment which orders the defendant to pay a certain sum of money. In an equity action, besides money damages, the plaintiff may get wholly different relief. For example, the court may order that the defendant has defaulted in the performance of a contract, instead of ordering that he pay damages the court may order him to specifically perform the contract.[38]

Thus, in instances where monetary remuneration alone is not an adequate remedy, other tools such as the injunction, mandamus, or the prohibition may provide a more equitable solution. Injured persons may elect to pursue a case in

the equity courts where the award of money alone will not place them in the same position they were prior to injury. Equity solutions are particularly beneficial in dealing with unique property where other such goods are not interchangeable in the marketplace. This view is exemplified in material goods, such as land, or in tangible goods having a brand name. Money damages alone may not be adequate restitution for fraudulent possession of land or for injury to one's brand name. In both instances adequate relief may be obtained only with specific injunction or prohibition in conjunction with monetary damages placed upon the defendant.

The extent of the law of equity in Alabama rests upon a limited number of statutes which create the right to and establish the procedure for equitable remedies. Section 289 of Title 7 of the Code states that

> The Alabama Equity rules adopted by the supreme court for equity practice in the courts of this state are hereby recognized; and the supreme court is empowered to adopt, from time to time, rules of pleading, practice and procedure in suits and proceedings in equity, and to amend the same, and said court may disregard any statutes, and rules of court or decisions inconsistent therewith, insofar as the same may be done agreeably to the Constitutions of Alabama and of the United States.

Section 290, likewise, recognizes the rules of equity practice adopted by the Supreme Court of the United States as the prevailing guide to suits in equity.

The equity rules, numbering some one hundred and twenty in all, concern themselves particularly with matters relating to the conduct of the court in the collection of information relative to the case at hand and the powers of the court in commanding justice. Of particular interest to this study are rules number 96, 108, and 118. The first of these formally adopts the power of injunction for the equity court. This power allows circuit court judges to grant injunctions returnable into any circuit court in the state. The injunctive tool allows the court to command action or restrain such action which the court deems "contrary to equity and good conscience."[39] Rule 108 relates to the situation where suits may be instituted at law and in equity for the same claim. Upon the initiative of the opposite party, the court may require the plaintiff to elect between an action at law or a suit in chancery; otherwise, two actions may be sustained until adequate remedy is obtained by the plaintiff. Rule 118 formally adopts the rules of the English Courts of Chancery as part of the common law of Alabama. Specifically, it states that

> Cases not covered by these rules, nor by decisions of the supreme court of Alabama, nor by statute, the practice in effect in the English Court of Chancery prior to the Judicature Act of 1873 (but not afterward) may be followed so far as it can be reasonably applied. . .

The state also has the right to bring suit in circuit court for an equitable remedy. Such suits are

governed by the same rules as between private individuals, and, if unsuccessful, the state is liable for court costs as are private citizens. As the law presently reads, the Governor of the State is the one who must initiate court action. He must direct the state's attorney, in writing, to initiate equity proceedings against the named defendant(s) in behalf of the citizens of Alabama.[40] The state may elect actions in equity with the intent of obtaining specific prohibitions or remedies which the defendant could not otherwise obtain in a case at law.

The 1972 passage of the "Mini Code" through the state legislature gave rise to other actions in equity. The "Mini Code" generally sets the legal rate of interest and regulates lending institutions operating within the state. It eliminates the holder in due course doctrine for consumer paper except in instances where an agreement to the contrary is signed. The "Mini Code" expressly prohibits referral sales and also provides for a three-day waiting period for cancellation of credit sales resulting from home solicitations. Section 324 of this act specifically states that

> A buyer has the right to cancel a home solicitation sale until midnight of the third business day following his execution of an agreement or an offer to purchase . . . The seller must deliver to the buyer and obtain his written signature to a written agreement or offer to purchase designating as the date of the transaction the date on which the buyer actually signs and containing the following under

> conspicuous caption: "BUYERS RIGHT TO CANCEL." "If this agreement was solicitated at your residence and you do not want the goods or services, you may cancel the agreement by delivering or mailing a notice to the seller. The notice must say that you do not want the goods or services and must be delivered or mailed before midnight of the third business day after you sign this agreement. This notice must be delivered or mailed to:_____ (insert name and mailing address of seller)."[41]

This act charges the Superintendent of the Banks of the State Banking Department with the responsibility of administration of this and other sections of the "Mini Code." The administrator may seek injunction for temporary relief against such respondents guilty of fraudulent or unconscionable conduct until final determination of continuance of license. Private citizens may likewise initiate action on their own in a court of equity for relief from situations set out in this act.

From the above examination of the legal structure pertaining to this study one can see that there are several courses of action which a defrauded consumer may take depending on the circumstances of the incident, the knowledge of the citizen of his rights, and his desires as to remedy. The various acts and interpretations thereof constitute the range of remedies available in retort to false or misleading advertising and sales practices.

## Protective Action

Legislative enactment and judicial interpretations of those acts provide the foundation for protection of the consumer from false and misleading advertising and sales practices. Yet legislative enactment by itself does not guarantee adequate protection for the consumer. Constructive action initiated by or in the behalf of the injured consumer is a necessary adjunct to legislation and, within limits, seems to act as a deterrent against future consumer abuse.

As indicated earlier in this chapter, there are several alternatives available to the injured consumer in seeking satisfaction. He may initiate action in his own behalf either in a court of law, in equity, or through his own bargaining. The injured consumer may also turn to administrative officers at the Federal or state level to assist him in obtaining a remedy to his problem. Finally, the injured party may enlist the aid of one of several independent agencies which are concerned with the business of consumer protection.

### Consumer Protection Office

On February 17, 1972, the Governor signed an executive order which established an Office of Consumer Protection within the executive branch of the state government. The Consumer Protection Officer who heads this division is an appointee of the Governor and is

charged with the responsibility of advising him on matters affecting the interests of consumers within this state and

> Whenever he receives, from any source, complaints or other information disclosing a possible violation of any law of the United States or any rule or order of any Federal agency concerning consumer interest or any law of the State of Alabama affecting such interest, the Consumer Protection Officer shall promptly investigate said complaint through and by his agents. If said investigation reveals illegal conduct then said Consumer Protection Officer shall immediately initiate such criminal proceedings as are allowed by law and go forward with such prosecutions as are permissible under the applicable laws in concert with proper prosecution officers. To further the aims and purpose of this Order the Consumer Protection Officer and his duly appointed agents shall be, and are, officers of the law with power of arrest.[42]

The Office of Consumer Protection has formally adopted the basic case procedure utilized by the state of Florida and outlined in its Procedures Manual.[43] This procedure essentially establishes a filing system which will give the immediate disposition of the complaints coming into the office. It also prepares copies of different form letters to accompany complaints sent to the "offending" concern and replies to the injured parties.

Protective action emanating from the Office of Consumer Protection is geared heavily towards voluntary solution of problems between buyer and seller. The director (Annie Laurie Gunter), three field investigators, two secretaries and an information officer comprise the

entire staff of the Office of Consumer Protection. At the time of this writing, the Consumer Protection Office does not employ legal counsel. Such a position is budgeted, but not filled. The Director envisions that this position will be advisory in nature rather than punitive of lawbreakers. Likewise, there is some question as to the constitutional authority of an appointee of the Governor to initiate court action. In those instances where mediation cannot be effected and where there is clear violation of law, prosecution is initiated through the district attorney in the area where the problem occurs or in the Attorney General's Office if the matter involves a state-wide violation.

The operating budget for fiscal years 1972-1973 and 1973-1974 is $150,000 for the two years combined. The majority of the first year's budget was allocated for fixtures, equipment and salaries. It was intended that heavy initial expenditures for operating equipment would free funds in future years to expand the staff and fund programs to deal with the anticipated growth in the number of complaints being lodged with this Office. Thus the staff could later effectively carry out their perceived informative and educational responsibilities.

During the first year of operations, the Office of Consumer Protection processed slightly over 2,000 complaints.[44] The pace of complaints received by the

Office has been greatly influenced by the receipt of a toll free telephone number and the attendant publicity surrounding this Office's activities in the second half of 1972. Complaints which flow into the Office of Consumer Protection are handled in one of two ways--they are either acted upon directly by an investigator with voluntary compliance or mediation as the objective or referred under a cover letter to another agency in instances where the complaint clearly falls within its jurisdiction. It is estimated that fewer than fifteen per cent of the incoming complaints are referred elsewhere.*

Office of the Attorney General

On a state-wide basis the Attorney General's Office is charged with the responsibility of representing the interest of the public at large. The Attorney General is the chief law officer of the state and the head of its legal department. He or his representatives

> . . . may institute, conduct and maintain all such suits and proceedings as he deems necessary for the enforcement of laws of the state, the preservation of order, and the protection of public rights. He is generally charged with the duty of representing the people of the state in all cases in which the state is a party or is interested, or in which the wrong or injury complained of affects the public generally.[45]

*Annie Laurie Gunter, Consumer Protection Officer, State of Alabama, personal interviews, May 18, 1972, and April 5, 1973.

The Attorney General's Office is neither authorized nor required to sue or defend on behalf of a municipality or county except in the case of special circumstances. Likewise, this Office, or its representatives, is prohibited by law from maintaining an action for the vindication of private grievances in which the public has no interest. But in the situation where an "offense" constitutes a public and a private injury simultaneously, the Attorney General may initiate an action in respect to the public injury.[46]

The Attorney General is required by statute to give written opinions on any question of law connected with the interest of the state and to prepare all legal contracts and writings in relation to state matters. Principally, the Attorney General "must attend, on the part of the state, to all cases pending in the supreme court and court of appeals and to all civil suits in which the state is a party in the same courts."[47] As the chief legal officer of the state, he may direct the prosecution in criminal cases in any of the courts of this state. Likewise, the Office of the Attorney General has the power to direct and even command the district attorneys in any circuit within the state to investigate and prosecute any cause in which the state is interested.[48]

The Attorney General has an appointed attorney within his office to handle all matters regarding consumer protection. The Assistant Attorney General in charge of

this duty, Tom Brassell, relates that he has been given a carte blanche to protect the interest of the consumer. Even though the Office of the Attorney General is restricted to prosecuting only those cases involving the public interest at large, it has assisted many individuals with strictly private injuries in receiving satisfaction on their claims. The procedure utilized when a private grievance comes before the Consumer Services Bureau is to investigate the situation to ascertain if the same action constitutes a public injury. If such can be determined, he will first seek voluntary compliance to the law and attempt to obtain restitution for the private injuries with which he is knowledgeable. If the lawbreaker's offense is flagrant or if he refuses to comply voluntarily, and if the case is clearly actionable, the Attorney General's Office will prosecute in behalf of the state. If the individual's complaint cannot be shown to affect the public interest, the only legal remedy will be through private action. The Chief of Consumer Services will, however, advise the injured party of his right to action and attempt, through the power of his office, to effect mediation between the two parties at odds.

The Consumer Services Bureau created a little over a year and one-half ago has recently been receiving approximately three hundred and fifteen complaints per month. Of these complaints, approximately one-third are

passed on to other administrative officers within the state system as the basis for petition clearly fall inside other agencies' jurisdiction. Those cases remaining are subject to investigation either by the Attorney General's office or by a district attorney who has been directed by the Attorney General to investigate the complaint and prosecute if necessary. Less than 10 per cent of the investigated complaints are found to be groundless; and approximately 40 per cent of the cases which come into the office deal with solely private injuries. It is estimated that 98 per cent of the valid complaints handled by this office or investigated indirectly through a district attorney are solved through mediation--either by voluntary compliance to the law or by settlement between the two parties at odds. The record of ninety-eight out of one hundred valid complaints being settled without initiating suit compares favorably with the general average of approximately 80 per cent of all claims being settled out of court.*

District Attorneys

The district attorneys are more local in their representation of the public than is the Attorney General. Their duties are generally confined to the districts for which they are elected. However, the Attorney General can,

*Tom Brassell, Assistant to the Attorney General of the State of Alabama, personal interview, May 23, 1972.

on his volition, direct a district attorney to carry on his function outside his proscribed area when necessity dictates.[49] The duties of the fifty-seven district attorneys located within the state are quite similar to those of the Attorney General but on a much smaller scale. Their duty "includes not only the conduct of prosecutions for crimes and offenses committed within the district, but also the prosecution of all civil actions in which either the state or county may be a party or interested."[50] Also, they are required to give advisory opinions to county officials where matters of legal policy are concerned; and they must sit in review of cases pending before the parole board in their jurisdiction.

The various district attorneys within the state are responsible for the protection of the public interest within their respective districts. Like the Attorney General, they are expressedly prohibited from representing the interests of private citizens when the interest of the county or state is not involved; and when such can be shown, they can only seek satisfaction for the public at large.[51] This prohibition does not preclude their advising the injured party of his legal rights and the possibility of the district attorney informally intervening in the behalf of the injured citizen. It appears, however, that the various county solicitors are not so willing or able to aid the private

citizen in obtaining voluntary satisfaction on his claims as is the specially appointed attorney in the Attorney General's Office. In fact, the Attorney General's Consumer Bureau has received several complaints which have come to this office after the local district attorney had been consulted.*

Private Action Groups

Although private action groups such as the Alabama Consumers Association, the League of Women Voters, Better Business Bureaus, Chambers of Commerce, and community action groups, to name a few, do not possess any legal authority beyond that of a private citizen, they do play a vital role in influencing the legislative process and encouraging constructive civil action through the use of the state and Federal court system. All of the above-mentioned groups seek to inform the consumer of his rights as a consumer, with the Alabama Consumers Association and Better Business Bureaus, particularly, attempting to warn consumers about fraudulent practices operating in the marketplace. Moreover they warn the groups about firms which seem to be preying on the public.

*G. A. Wright, District Attorney of Lee County, Alabama, personal interview, May 10, 1972; D. W. Crossland, District Attorney for Montgomery County, Alabama, personal interview, May 23, 1972.

Better Business Bureaus

Only three cities within the state (Birmingham, Huntsville, and Mobile) have Better Business Bureaus. They are often described as "non profit agencies set up and supported by businessmen for businessmen . . . They were created to protect business by building an environment of public confidence in which companies can operate peacefully and profitably."[52] Early in 1972, the Birmingham Better Business Bureau undertook an extensive promotional program utilizing all forms of public service media. Entitled "The Consumer Speaks Out", it attempted to generate greater public awareness of the Better Business Bureau's presence and tried to change its image of an "association of businessmen for businessmen." Although not a measure of the program's long-run effectiveness, the number of complaints and/or inquiries handled by the Birmingham Bureau (approximately 115 per month) has nearly doubled since the program's inception.*

On a regular basis, all the Bureaus in the state attempt to educate and inform consumers through their "Read before you sign" and "If in doubt, call us" type promotional programs. The Better Business Bureaus and the ninety-nine local Chambers of Commerce, which act as their counterparts in their absence, can do little actually

*Robert B. Renwick, General Manager of the Better Business Bureau of Birmingham, Alabama, personal letter, June 28, 1972.

to protect the consumer beyond an attempt to coerce a member or non-member to cease and desist fraudulent practices. However, they can turn over their files to the proper prosecuting agency for action.

Alabama Consumers Association

The Alabama Consumers Association operates on a similar parallel to that of the Better Business Bureaus except for the fact that the Consumers Association operates out of one office for the entire state. Their membership is composed of private citizens as well as commercial enterprises. The Association's stated objectives are as follows:

> The purpose of this Association is to insure protection of the consumer in the marketplace through the following means
> Education. To make him more aware of the practices of the marketplace and to provide him with the tools necessary to buy wisely.
> Information. To gather, exchange, and disseminate information of value to the consumer.
> Coordination. To assist and to work for the coordination of the persons and organizations interested in the protection of the consumer.
> Legislation. To promote sound legislation in the interest of the consumer and to help insure its effective enforcement.
> Representation. To provide the consumer with a voice before those agencies of government which regulate or affect those goods and services which he purchases.[53]

The primary emphasis of the Alabama Consumers Association's activities seems to be centered upon the fourth objective--legislative change. Much of this group's recent efforts

are centered around marshaling support behind constructive consumer legislation. The Association also sends out to members and interested persons and organizations a quarterly newsletter to keep its readers informed of its activities and to warn them of fraudulent schemes known to be operating within the state. The publicity chairman of the group augments this effort by periodically mailing out information and news articles relating to the Association's activities to the various news media around the state.

League of Women Voters

The League of Women Voters is likewise active in the area of consumer protection. Each year the state-wide group picks a legislative topic for thorough investigation with the intent of establishing a position which its members can knowledgeably support. The topic chosen for this year is the broad area of consumer protection. The primary aim of this group in this endeavor is to assess the present legislation which provides protection to the consuming public. From there, the League purports to examine the alternative means of overcoming the "problems" as the members see them, and to design a legislative package. Once the League of Women Voters has established its position in regard to consumer protection, the group will attempt to influence the legislative process through the efforts of their members.*

*Mrs. Katz, State Chairwoman, League of Women Voters, personal interview, May 18, 1972.

Community action groups

The various community action groups around the state such as those in Birmingham, Montgomery, Mobile, Huntsville and Auburn, likewise, add some measure of protective action in the area under study. As with other private action groups, they possess no legal authority to act; but they do attempt to educate the consumer (particularly the low income consumer) to avoid the pitfalls of dealing with unscrupulous vendors. These community action groups often act in the behalf of the injured consumer in effecting voluntary solution to his problem. They also may advise consumers of the legal remedy available and seek free legal aid in the consumers' behalf.*

## Court Action

In the normal flow of protecting the consumers' interest the fact that certain actions are prohibited by law will prevent the vast majority of individuals from undertaking such action. The actual threat of prosecution will likewise bring compliance from most of those who consciously or unconsciously violate the law. There are, however, certain individuals for whom court action provides the only avenue toward a remedy.

*Robert T. Fine, VISTA Legal Council, Auburn, Alabama, personal interview, February 24, 1972.

Process of Remedy

The course of events leading to a solution of a case depends upon whether the cause for action arises out of a violation of criminal law or possesses the characteristics of a civil case (at law or in equity). In cases involving violations of criminal law the solicitor, whether district attorney or the Attorney General's staff, is charged with the responsibility of protecting the public interest and the prosecution of violators of the law. As stated earlier, criminal law is punitive in nature and the solicitor is the representative of the public. Yet, prosecution is not the only avenue utilized in protecting the public interest. The Attorney General's office and the various district attorneys often seek voluntary compliance to the law rather than punitive justice in the fulfullment of their duty. With approximately 98 per cent of the legitimate consumer complaints being settled out of court, it appears that the solicitors use this process often.*

In a civil case, the end objective is somewhat different from that of criminal proceedings. Here the plaintiff is seeking a restorative rather than punitive type action. If this end objective can better be served through settlement out of court, there is little need to pursue further action. Jay A. Sigler states that in civil cases, because of the expense, psychological strain,

*Tom Brassell, personal interview.

and time delay, "each party's attorney will probably seek settlement more actively than he will pursue trial preparation. It is often preferable to the expensive uncertainties of trial outcome."[54]

Even though a small proportion of claims against vendors utilizing false and misleading advertising and sales practices come into the courts, an examination of the court records gives some insight into the volume of complaints being litigated under our existing legal environment. At the circuit court level the court records of three circuits--Lee, Montgomery, and Greene--were examined to ascertain the volume of complaints filed under the relevant statutes outlined earlier in this section. These three circuits are not presented as a truly representative picture of the state as a whole; rather, this examination to show some measure of activity in the area of consumer protection under study in the lower courts in circuits of different sizes.* The actual

*Lee and Montgomery County circuits were selected because of proximity and size. Greene County circuit was included because of the fact that it is the smallest county in the state having a population of 10,650 according to the 1970 Census of Population. The Lee County circuit (as is Greene) is a one-judge circuit having some 61,268 persons within the confines of its jurisdiction. The Montgomery circuit, by way of contrast, is a three-judge circuit with some 167,790 residents. Montgomery County is distinguished also by the fact that it is the home county of the attorney general. Here out of state defendants and cases involving state-wide violations are brought to court.

court dockets in the criminal, civil law, and equity courts were examined for the five-year period 1967-1971. Each case was reviewed to determine if the statutes presented earlier in this chapter were used as the "point of law" in bringing court action.

Lee County Circuit Court Cases

Data in Table II, presented on the next page, show the number of cases in the Lee County circuit reported by the statutes under study by year (1967-1971) and relate this number as a percentage of the total cases brought before the bench during this period. Cases initiated under the criminal sections outlined earlier in this study comprised only .108 per cent of the total number of criminal cases heard during this five-year period. In the civil court of law, .492 per cent of the cases heard pertained to statutes relevant to this study. During the same period, some .421 per cent of the cases in equity were found to be relevant. Overall, the portion of cases brought before the court pertaining to fraudulent advertising and sales practices seems quite small (all less than 1 per cent) in relation to the widespread attention given to the area of consumer protection in general.

Montgomery County Circuit Court Cases

In Table III, presented on page 97, are found the results of the same type of analysis of the court records of the Montgomery County circuit. As a

## Table II

Cases Reported by Relevant Statutes Under Study in Criminal and Civil Law Sections and Equity In the Lee County Circuit by Number and Per Cent of Total Cases Cited 1967 - 1971

| Year | Criminal | | Civil Law | | Equity | |
|---|---|---|---|---|---|---|
| | no. relevant cases | total no. cases reported | no. relevant cases | total no. cases reported | no. relevant cases | total no. cases reported |
| 1967 | 2 | 1230 | - | 228 | - | 236 |
| 1968 | - | 1194 | 2 | 226 | 3 | 255 |
| 1969 | 1 | 955 | - | 208 | - | 309 |
| 1970 | 2 | 1006 | 3 | 235 | 2 | 317 |
| 1971 | 1 | 1181 | 1 | 119 | 1 | 302 |
| 5 YR. TOTAL | 6 | 5566 | 5 | 1016 | 6 | 1419 |
| 5 YR. % of TOTAL | .108% | | .492% | | .421% | |

Table III

Cases Reported by Relevant Statutes Under Study in Criminal and Civil Law Sections and Equity in the Montgomery County Circuit by Number and Per Cent of Total Cases Cited 1967 - 1971

| Year | Criminal | | Civil Law | | Equity | |
|---|---|---|---|---|---|---|
| | no. relevant cases | total no. cases reported | no. relevant cases | total no. cases reported | no. relevant cases | total no. cases reported |
| 1967 | 3 | 2349 | 12 | 5921 | 2 | 1442 |
| 1968 | 4 | 2132 | 21 | 6301 | 4 | 1569 |
| 1969 | 4 | 2321 | 17 | 5832 | 2 | 1392 |
| 1970 | 1 | 2096 | 19 | 5149 | 5 | 1528 |
| 1971 | 7 | 2614 | 24 | 6145 | 4 | 1424 |
| 5 YR. TOTAL | 19 | 11512 | 93 | 29348 | 17 | 5834 |
| 5 YR. % of TOTAL | .165% | | .317% | | .291% | |

percentage of the five-year total of criminal cases brought before the bench, some 19 or .165 per cent of the cases pertained to the criminal statutes under study. In the civil law court .317 per cent of the cases were found to be relevant; and in the equity court only .291 per cent or 17 cases heard over the past five years dealt with those sections under examination.

Greene County Circuit Court Cases

The study of the Greene County circuit, presented in Table IV, on the following page, shows only one criminal case brought to court under the relevant statutes in the past five years. This number which comprises .163 per cent of the total number of criminal cases heard is remarkably similar to that of both Lee and Montgomery County circuits. Two cases of the 492 heard in the civil law court since 1967 involved violations of those civil statutes under study. This percentage of the total, .407, is about midway between the range shown in the Lee circuit as compared to the Montgomery circuit. Of course, with none of the 304 equity cases heard in the Greene County circuit pertaining to the statutes under study, there is no percentage basis for comparison.

Table IV

Cases Reported by Relevant Statutes Under Study in Criminal and Civil Law Sections and Equity in the Greene County Circuit by Number and Per Cent of Total Cases Cited 1967 - 1971

| Year | Criminal | | Civil Law | | Equity | |
|---|---|---|---|---|---|---|
| | no. relevant cases | total no. cases reported | no. relevant cases | total no. cases reported | no. relevant cases | total no. cases reported |
| 1967 | - | 96 | - | 74 | - | 57 |
| 1968 | - | 101 | 1 | 82 | - | 60 |
| 1969 | - | 146 | - | 121 | - | 49 |
| 1970 | 1 | 123 | - | 103 | - | 73 |
| 1971 | - | 149 | 1 | 112 | - | 65 |
| 5 YR. TOTAL | 1 | 615 | 2 | 492 | - | 304 |
| 5 YR. % of TOTAL | .163% | | .407% | | 0% | |

Appellate and Supreme Court Cases

Data in Table V, found on the following page, represents the findings of a similar examination of the appellate and supreme court records of the State of Alabama since 1910. In this instance each case was not reviewed. A special index was available in each volume to direct the reader to those cases which utilized the point of law under study. The disadvantage of this method arose from the inability to separate the total number of cases in each volume into criminal, civil law, or equity classifications. This difficulty prevented direct percentage comparison by case category between the findings of the three circuits and the records of the higher courts.

Of the 33,816 cases heard by the appellate courts in Alabama since 1910, only 37 or .109 per cent pertained to the criminal or civil statutes examined in this study. By contrast, the Supreme Court of Alabama heard some 49,409 cases during the same period with some 115 cases or .223 per cent of the total pertaining to the statutes outlined earlier in this section. When one compares the appellate and supreme court records, it must be recognized that equity cases are appealed directly to the supreme court while criminal and civil law cases often flow through the appellate courts before being appealed to the supreme court.

Table V

Cases Reported by Relevant Statutes Under Study in Appellate and Supreme Courts in the State of Alabama by Number and Per Cent of Total Cases Cited Since 1910

| | Cases in Appellate Courts | Cases in Supreme Court |
|---|---|---|
| Criminal Law | 23 | 8 |
| Civil Law | 14 | 63 |
| Equity Cases | 0 | 44 |
| Total No. Relevant Cases | 37 | 115 |
| Total No. Cases Reported Since 1910 | 33816 | 49409 |
| % of Total No. Cases | .109% | .223% |

In comparing the combined totals of criminal, civil law, and equity cases in the Lee, Montgomery, and Greene circuits, the percentage of the relevant to the total number of cases shows remarkable similarity to the supreme court figure. Combining the criminal, civil law, and equity court records in Lee, Montgomery, and Greene circuits showed .212, .276, and .263 per cent respectively. These data are insufficient to say much conclusively about the volume of cases pertaining to false and misleading advertising and sales practices in the lower courts; yet comparing the percentage of the relevant cases to the total heard in the three circuits examined to the historical record of the appellate and supreme courts of the State of Alabama leads one to suspect that there is a good deal of similarity, even though the percentage appears rather insignificant overall.

Some individuals examining these data might suggest that the small volume of cases cited under the statutes outlined in this chapter exemplifies the deterrent effect of good legislation. The large number of mediated cases and voluntary settlements might possibly reflect a fear on the part of the defendant against an adverse decision resulting from a stringent legislative environment. However, many things point to the opposite conclusion--that Alabama's consumer protection legislation is in need of improvement. The content of the next chapter, which

examines the complaints of the existing consumer protection agencies in Alabama, presents a survey of the state legislators; it furthermore depicts their attitudes toward legislative improvement.

NOTES

[1]William L. Clark, Jr., Handbook of Criminal Law (St. Paul: West Publishing Co., 1915), Chapter 1.

[2]William Mack and William B. Hale, ed., Corpus Juris, Vol. XV (New York: The American Law Book Co., 1918), p. 721.

[3]Ibid., Vol. I, p. 930.

[4]Garrard Glenn, Cases and Materials on Equity (Charlottesville: The Michie Company, 1946), pp. 8-12.

[5]Mack and Hale, Vol. XXI, p. 23.

[6]Ibid., p. 27.

[7]Henry J. Abraham, The Judicial Process (New York: Oxford University Press, 1962), p. 16.

[8]Ibid., p. 9.

[9]Mack and Hale, Vol. XII, p. 176.

[10]Title 14 of the Alabama Code is the principal declaratory title for the criminal law; however Titles 2, 22, 28 and 46 do provide for criminal penalties for specific types of false and misleading advertising and sales practices.

[11]46 Ala. Code 270; 46 Ala. Code 64(5).

[12]Hope v. State, 5 Ala. App. 123 (1912); Carpenter v. State, 24 Ala. App. 468 (1931); Holloway v. State, 37 Ala. App. 96 (1952); Beasley v. State, 39 Ala. App. 20 (1958); White v. State, 86 Ala. 69 (1889); Franklin v. State, 214 So. 2d. 924 (1968).

[13]Colly v. State, 25 Ala. App. 85 (1932); Pierce v. State, 15 Ala. 115 (1898); Jones v. State, 236 Ala. 182 (1938).

[14]McKee v. State, 26 Ala. App. 208, 209 (1934).

[15]Eaton v. State, 16 Ala. App. 405, 406 (1918).

[16]Addington v. State, 16 Ala. App. 10, 17 (1918).

[17]15 Ala. Code 312.

[18]7A Ala. Code 2-302.

[19]Campbell Soup v. Wentz, 172 F. 2d. 80 (1948).

[20]Arthur A. Laff, "Unconscionability and the Code--The Emperor's New Clause," University of Pennsylvania Law Review, Vol. CXV (March, 1967), p. 845.

[21]Cooper v. Rowe, 208 Ala. 494 (1922); Standard Oil v. Myers, 232 Ala. 662 (1936).

[22]Caffey v. Alabama Mach. Co., 19 Ala. App. 189 (1922); Fidelity Co. v. Pittman Tractor Co., 244 Ala. 354 (1943).

[23]Shepherd v. Kendrick, 236 Ala. 289 (1938); Hudson v. Moore, 239 Ala. 130 (1940).

[24]Mutual Savings Life Insurance Co. v. Brown, 245 Ala. 423 (1944); Bories v. Edwards, 262 Ala. 172 (1954); Caffey v. Alabama Mach. Co.

[25]Jordan and Sons v. Pickett, 178 Ala. 331, 338 (1902).

[26]Metropolitan Life Insurance Co. v. James, 238 Ala. 337, 341 (1939).

[27]Mudd v. Lanier, 247 Ala. 363 (1945).

[28]Standard Motorcar Co. v. McMahon, 203 Ala. 158 (1919).

[29]Brasher v. First National Bank, 232 Ala. 158 (1936).

[30]Maloney v. Fulenweiner, 213 Ala. 205 (1925).

[31]Hokinsmith v. Winton, 11 Ala. App. 670 (1914).

[32]Ibid., p. 675.

[33]Kilby Locomotive and Machine Works v. Lacey & Son, 12 Ala. App. 464, 469 (1915).

[34]Ibid.; Brasher v. First National Bank.

[35]Birmingham Broadcasting Co. v. Bell, 259 Ala. 656 (1953).

[36]Hafer v. Cole, 176 Ala. 242, 247 (1912).

[37]28 Ala. Code 90(3).

[38]Samuel I. Shuman and Norbert D. West, American Law: An Introductory Survey of Some Principles (Detroit: Wayne State Press, 1971), pp. 111-112.

[39]Mack and Hale, Vol. XXXII, p. 19.

[40]7 Ala. Code 292.

[41]5 Ala. Code 316-341.

[42]Governor's Executive Order No. 17, Signed by Governor George Wallace, Montgomery, Alabama, February 17, 1972; Emphasis the Author's.

[43]Florida Department of Agriculture and Consumer Services, Procedures Manual--Division of Consumer Services (Tallahassee: State of Florida, August, 1971).

[44]Office of Consumer Protection, Consumer Newsletter (Montgomery: State of Alabama, February, 1973), p. 1.

[45]Mack and Hale, Vol. VI, pp. 812-813.

[46]Ibid., pp. 813-814

[47]55 Ala. Code 228.

[48]55 Ala. Code 236.

[49]Ibid.

[50]Mack and Hale, Vol. XVIII, p. 1306.

[51]55 Ala. Code 232.

[52]"What is a Better Business Bureau Anyhow?," Changing Times, Vol. XIX, No. 10 (October, 1965), p. 17.

[53]Alabama Consumers Association, Articles of Incorporation: By-Laws of the Alabama Consumers Association, May 28, 1969.

[54]Jay A. Sigler, An Introduction to the Legal System (Homewood: Dorsey Press, 1968), p. 129.

## CHAPTER IV

## RECOGNIZED AREAS OF NEEDED CONSUMER PROTECTION WITHIN THE STATE

The preceding chapter dealt with the described areas of consumer protection currently in force in Alabama and attempted to give the reader some insight into the level of enforcement. In a continuation of this examination into the needs of this state in the regulation of false advertising and sales practices, two principal sources were surveyed to obtain their opinions as to the deficiencies in Alabama's program of consumer protection. The members of the state legislature who constituted the first survey group were chosen because of their position as representatives of the citizens of Alabama. Administrators of the existing agencies involved in protecting the consumer from false advertising and sales practices collectively formed the second group. They were interviewed personally to develop insight into the current problems they face in providing practical enforcement of consumer protection legislation and the possible means of problem correction.

### Survey of State Legislators

The members of the state legislature, as duly elected representatives of the people, were selected as the first

survey group because of their assumed awareness of the types of consumer problems their constituents face in the marketplace. Further, it was assumed that the legislators were knowledgeable of the possible means of remedying problems of consumer abuse. This first survey group was reached by direct mail inquiry because of the size and proximity of the legislative body when it was not in session.

The Questionnaire

The survey instrument (presented along with the introductory letter in Appendix A) was printed on slightly oversized paper stock so that it would be no longer than a single page; brevity was essential for a high return rate. The questionnaire was designed with initial set of questions which could be answered quickly and easily by the respondent. This was done in an attempt to channel the respondent's thoughts to the more involved questions posed later in the questionnaire. In all, the question type utilized ranged from simple multiple choice and modified Stapel scales to the open-ended or free answer type.

The object of the first two questions is apparent--to determine the frequency in which state legislators were receiving complaints and/or suggestions relative to consumer protection and to ascertain if the trend was increasing, decreasing or remaining relatively stable. The third question set examined the degree of support or rejection each responding member of the legislature would give to selected legislative areas.

The principal areas of consumer protective legislation thought to be relevant to this study were presented in list form in question three. This list of areas of possible legislative interest was compiled through a judgmental sample of legislators and administrators of consumer programs and did not pretend to be all-inclusive. Legislators were asked if they would be willing to support or reject:

1. The elimination of the holder in due course doctrine--this refers to the practice of selling commercial paper (specifically installment sales contracts) free of encumbrances or liability to the buyer.*

2. Making false advertising a civil offense--at present false advertising is a criminal offense and prosecuted as a crime against the state.

3. Permitting class action suits--this is the practice whereby individuals (known and unknown by name) are allowed to combine together and initiate legal action as a group rather than singly.

4. Prohibiting pyramiding sales schemes--a pyramid sales scheme generally involves the payment of money for the chance or right to receive compensation from introducing other "franchisees" or "dealers" into the program and receiving overriding compensation for all

*The previously mentioned Mini Code outlaws this type arrangement except where there is an agreement to the contrary in the finance contract. It was specifically included as a legislative alternative to strike this limitation from the law.

others they may introduce into the program or from merchandise or service which is subsequently sold under this system.

5. Adoption of the "little FTC Act"--this generally refers to the various versions of the model code patterned after the Wheeler-Lea Amendment to the FTC Act which "outlaws unfair method of competition and unfair or deceptive acts or practices."

6. Closer regulation of warranties--this suggests that the state become more involved in policing warranty provisions, requiring that manufacturers and retailers fulfill their responsibilities under implied and express warranties.

7. Outlawing bait and switch advertising--this is the practice of advertising a product or service at a very favorable price with no intent of selling that good, the objective being to trade the prospect up into higher priced items.

8. Controlling going-out-of-business sales--this pertains to the promotional abuses centered around distressed merchandise sales and inventory sales at "reduced" prices due to business closure.

9. Awarding payment of attorney fees in private action suits--at present only court costs are included with successful judgments. Attorney's fees must be paid or absorbed by the plaintiff.

10. Providing for the possibility of forfeiture of the fraudulent company's franchise--currently, dissolution of a firm using fraudulent business practices is possible only through the circuitious route of denying a business license.

A modified Stapel scale was used for response to question number three. The instructions directed respondents to relate their willingness to support specific legislative areas in consumer protection through the use of a seven-point scale ranging in continuum from -3 to +3. A scaling technique was employed in order to allow measurement of valence--the degree of favorability or disfavorability of response.[1] Respondents were instructed to give a rating of +3 or possibly +2 to those legislative areas they would consider beneficial to the consumer. Conversely, on those items that they were against and would not support, they were instructed to give a rating of -3 or perhaps -2. The zero position in the seven-point scale was explained as conveying a neutral or indifferent response.

The scaling device itself differs from the original design of the Stapel scale in that it utilized a seven-point continuum (from -3 to +3) which includes a zero position instead of the ten-point scale (from -5 to +5) with the zero point assumed.[2] A seven-point scale was employed because it was felt that a wide range of possible reply would produce too many variations in response, and

thus make it difficult to categorize and analyze respondent attitude toward the proposed legislative areas. This narrower range or choice given respondents was patterned after the customary seven-point spacing most often used with the semantic differential technique.[3] Difference also lies in the fact that the Stapel scale uses individual descriptive adjectives as cues, whereas the method employed in this study substitutes phrases describing distinct areas of consumer legislation.

It was felt that the continuum scale from +3 to -3 would assist in communicating the intent of this question set and that the respondent would immediately identify the positive spectrum with favorable support of specific legislation and the negative range with a disfavorable attitude towards passage. The zero position was included to allow for the neutral or ambivalent response, so as not to have a forced choice of support or rejection of a specific piece of legislation placed upon respondents.[4] The use of leading phases to introduce areas of consumer protection appeared to express more nearly the intent of the questioning device than single descriptive terms or the selection of bi-polar adjectives or phrases. Other scaling devices could well have proved adequate; however, this design appeared to suit the needs of research best.

Question number four was designed to develop insight into special Alabama problems which would make it

difficult to protect the interest of consumers; also it asked the legislators to relate their ideas as to how these barriers might be overcome. The next query, a dichotomous question, was designed simply to determine if the members of the state legislature preferred civil or criminal penalties as a means of remedying problems of consumer abuse. The final two questions were utilized to encourage respondents to detail any special areas of consumer protection they felt should be considered, areas which may not have been included in question number three.

Pretest of the questionnaire revealed that approximately fifteen minutes of respondee involvement was required to complete the instrument. Since the questionnaire was pretested on members of the legislature that were included in the judgmental sample mentioned earlier, it was thought to be a satisfactory instrument. The leading assumption in question number one was not revealed until replies started coming-in; only then was it recognized that some legislators might not be receiving any complaints and/or suggestions relating to consumer problems.

Methodology

The universe which was surveyed consisted of 141 members of the Alabama legislature: 35 senators and 106

representatives. Replies to the direct mail questionnaire were received from 121 members of the legislature. Since two of these replies were rejected because of insufficient data, there was left a useful return of 84.4 per cent of the universe. Such a large percentage response is generally taken to be representative of the universe being sampled. However, because of the method of self-selection in the respondents choosing to reply or not, no statistical inference can be made about the universe.

Members of the state legislature were assured anonymity of response in the personalized lead-in letter to reduce possible fear on the part of the respondee that he might be adversely quoted from his response at a later date. Thus, there was no attempt to code the questionnaire in any manner to determine who replied and who did not. As a result, replies to the questionnaire could not be stratified by house (whether the returned instrument came from a senator or representative). Furthermore a "legislative majority" (71 of a universe of 141 legislators) as described in this chapter and elsewhere does not imply equal distribution of response in both houses.

The return factor of 84.4 per cent was achieved through the collective effort of three mailings. The initial questionnaire, personalized lead-in letter, and stamped, self-addressed envelope were sent out on June 30, 1972. Approximately ten days after the universe

received the first inquiry a reminder post card was mailed to stimulate early response. As replies were anonymous, the entire universe received a second copy of the questionnaire and a modified lead-in letter (also included in Appendix A) after another interval of ten days in a final appeal to those legislators who had not complied to earlier requests. Because of time constraints, August 1, 1972, was designated as the cut-off date beyond which replies were not included in this study.

Data generated by returned questionnaires were analyzed in two ways: straight summarization in totals and percentages and cross tabulation by relevant strata of response. Frequency of receipt of consumer complaints and/or suggestions provided the only effective base for cross tabulation. Response to the modified Stapel scale utilized in the questionnaire was also summarized in totals and percentages; yet because of the special nature of the question type certain things must be recognized. As respondents were simply asked to rate each of the listed factors on a seven-point scale relative to their willingness to support or reject the legislative area, this was a one-dimensional rather than a multidimensional scale.[5] Likewise, even though the scale implies equal interval spacing in the continuum from -3 to +3, it cannot be assumed that the respondents view the numerical spacing to be equi tant. The scaling device used displays he prop es of an ordinal scale which requires

response merely to distinguish direction of reply. Intensity of response (+2 versus +3) is relative and is subject to variable interpretation by each of the respondents. One person may view +2 and +3 as being very close spatially and thus may use either category to express his positive response; in contrast, another person may view a +3 response as being significantly more positive than the +2 reply. Thus he would not consider the two classes to be close for response purposes. Because of the fact that this is an ordinal scale, "statistical description is limited to positional measures like the median, quartile, and percentile or other summary statistics which deal with order among entities."[6]

As would be expected with the use of the open-ended type questions, particularly in combination with direct mail, response errors were present in the questionnaires returned by the legislators. No response or the absence of reply to specific questions was prevalent in the open-ended inquiries. Response biases of this sort are explained by Green and Tull as being due to inability or unwillingness on the part of the respondent to reply accurately. Granted no response could be due to poor question wording, yet time costs--the failure to respond or the giving of an inadequate response because it involves less mental effort and time--may better explain no response to the open-ended questions.[7]

No response was also present in the replies to the modified Stapel scale utilized in the questionnaire. Analysis of no responses to this question set revealed that in no instance did any single respondent fail to provide a rating on more than two items. In accordance with the reasoning in the above paragraph, logic supports the position that legislators refused to divulge their attitudes towards specific legislative areas either because (1) they feared possible reprisal to their reply to perceived controversial areas; (2) they were unknowledgeable about the proposed legislation; or (3) the communication process was at fault and the respondent simply did not understand the concept conveyed.

Survey Results

As a whole, response from the legislators generally favors expanding consumer protection at the state level in Alabama. Nadel implies in The Politics of Consumer Protection that such a favorable reply could be anticipated because, in the context of the times, it is "good politics" to support consumer protection; few issues at present better communicate to a legislator's constituents that he is concerned for their welfare than that of consumerism. Nadel further suggests that the major factor behind the enactment of much of the recent consumer legislation is consumer pressure which has made it profitably politically for legislators to devote their efforts in this area.[8]

Frequency of consumer complaints

Survey results revealed that a substantial number of consumer complaints and/or suggestions are being directed at the members of the state legislature each month. The reported frequency of consumer complaints and/or suggestions from the 119 legislators replying to the questionnaire is summarized in Table VI. Only 11 per cent of the respondents indicated that they received no feedback from their constituents. In comparison, 87 legislators or approximately 73 per cent of those replying to the questionnaire said that they received from one to five suggestions and/or complaints per month; 14 respondents or approximately 12 per cent of the total indicated a volume from six to ten; and only five legislators reported that they averaged more than ten per month. Even if the replies of those responding to the questionnaire is not representative of the universe (twenty-two members of the state legislature failed to respond), the overwhelming majority of the legislators are consistently reminded of the problems of consumer abuse.

Table VI

Consumer Complaints and/or Suggestions Received By Legislators Per Month by Number and Per Cent

| Range | No. Replies | Per Cent |
|---|---|---|
| Zero | 13 | 11.0% |
| 1 - 5 | 87 | 73.1 |
| 6 - 10 | 14 | 11.8 |
| 11 - 15 | 3 | 2.5 |
| 16 - 20 | 1 | 0.8 |
| 21+ | 1 | 0.8 |
| TOTAL | 119 | 100.0% |

Data presented in Table VII indicate that the number of petitions concerning consumer protection directed to the legislators appears to be relatively stable as compared to the volume received a year earlier. Some ninety-five respondents or approximately 80 per cent of the total indicated that they receive about the same number of consumer complaints and/or suggestions as they received in the year previous. Some 11.8 per cent of the respondents replied that the number had increased, while approximately 8 per cent of the correspondents indicated that the

number had declined from a year ago. Cross classification of this question with the one previous revealed that practically all of those who indicated having received a greater number of petitions than a year ago currently received six or more per month, whereas those indicating a lesser number of petitions currently received between one to five per month.

Table VII

Number of Current Complaints and/or Suggestions Received by Legislators as Compared to a Year Ago

| Reply | No. Replies | Per Cent |
|---|---|---|
| Greater Number | 14 | 11.8% |
| Lesser Number | 10 | 8.4 |
| About the Same | 95 | 79.8 |
| Total | 119 | 100.0% |

Attitudes toward selected consumer legislation

The members of the state legislature as a group generally indicated their willingness to support all the proposed areas of legislation outlined earlier in the scalar type question. A summary of the legislators' replies, indicating their attitudes toward each item, is presented in Table VIII on the next page. A close examination of this table reveals a distinct pattern of response. The

Table VIII

Profile of Legislators' Replies as to Their Support of Specific Consumer Legislation in Number of Responses Per Category and Percentage

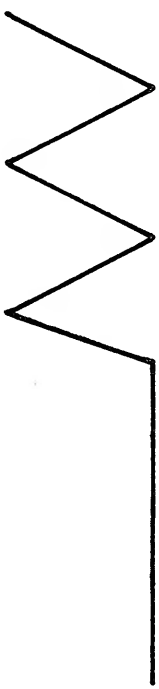
| Legislative Area | N/R | | -3 | | -2 | | -1 | | 0 | | +1 | | +2 | | +3 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % | No. | % |
| Elimination of the holder in due course doctrine | 9 | 7.6 | 16 | 13.4 | 2 | 1.7 | 3 | 2.5 | 48 | 40.3 | 4 | 3.4 | 14 | 11.8 | 23 | 19.3 |
| Making false advertising a civil offense | 5 | 4.2 | 2 | 1.7 | 2 | 1.7 | 2 | 1.7 | 8 | 6.7 | 27 | 22.7 | 30 | 25.2 | 43 | 36.1 |
| Permitting class action suits | 2 | 1.7 | 16 | 13.5 | 6 | 5.0 | 3 | 2.5 | 30 | 25.2 | 21 | 17.7 | 18 | 15.1 | 23 | 19.3 |
| Prohibiting pyramiding sales schemes | 1 | 0.8 | 6 | 5.0 | 4 | 3.4 | 1 | 0.8 | 13 | 11.0 | 7 | 5.9 | 37 | 31.1 | 50 | 42.0 |
| Adoption of the "little FTC Act" | 12 | 10.1 | 5 | 4.2 | 2 | 1.7 | 9 | 7.6 | 39 | 32.7 | 24 | 20.1 | 14 | 11.8 | 14 | 11.8 |
| Closer regulation of warranties | 1 | 0.8 | 1 | 1.7 | 1 | 0.8 | 4 | 3.4 | 13 | 11.0 | 24 | 20.1 | 25 | 21.1 | 49 | 41.1 |
| Outlawing bait and switch advertising | 1 | 0.8 | 5 | 4.2 | 1 | 0.8 | 4 | 3.4 | 7 | 5.9 | 22 | 18.5 | 26 | 21.9 | 53 | 44.5 |
| Controlling going-out-of-business sales | 2 | 1.7 | 6 | 5.0 | - | 0.0 | 3 | 2.5 | 23 | 19.3 | 27 | 22.7 | 25 | 21.1 | 33 | 27.7 |
| Awarding payment of attorney fees in private action suits | 3 | 2.5 | 15 | 12.6 | 6 | 5.0 | 4 | 3.4 | 23 | 19.3 | 17 | 14.3 | 19 | 16.0 | 32 | 26.9 |
| Providing for the possibility of forfeiture of fraudulent company's franchise | 2 | 1.7 | 4 | 3.4 | 7 | 5.9 | 5 | 4.2 | 17 | 14.3 | 27 | 22.7 | 21 | 17.6 | 36 | 30.2 |

modal response for each suggested legislative area, depicted in Chart I below, indicates that the +3 reply (the most positive response available) was selected most often for seven of the ten categories. In contrast, the remaining three categories received a modal response of zero, answers indicating an ambivalent attitude toward these legislative areas.

Chart I

Modal Profile of Respondents' Attitude as to Support of Specific Legislative Areas

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |



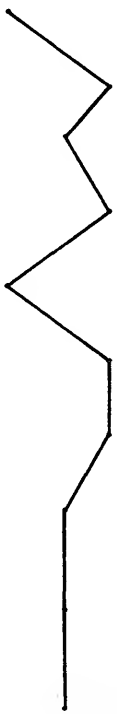
Another method of examining the data presented in Table VIII is through the use of the median value--the midpoint in response from the 119 legislators replying to the questionnaire arranged in sequence from +3 to -3. The median profile of response is presented in Chart II on the following page. When one compares the median profile with that of the mode it is interesting to note how the median affects the profile--narrowing the range of variation of the overall profile due to the fact that it represents the fiftieth percentile response instead of the most frequently occurring response. Both profiles, however, indicate a generally positive attitude toward the outlined areas of consumer protection legislation. The median view produces an indifferent or zero profile rating for only two items--the elimination of the holder in due course doctrine and the adoption of the "little FTC Act."

An examination of Table VIII from a negative point of view presents a slightly different perspective. The percentage of respondents giving a reply of -1 or lower for each of the ten legislative areas is presented in Table IX. As indicated in this table, those legislators, as a group, who chose to respond to each question area held the greatest reservations against class action suits and the court award of attorney fees to the successful plaintiff in private action suits. The holder in due course doctrine likewise received a number

Chart II

Median Profile of Respondents' Attitude as to Support of Specific Legislative Areas

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |



of negative replies; this percentage of negative response could be explained by the fact that some lawmakers felt that they had enacted sufficient legislation in this area in the passage of the "Mini Code."

When one attempts to determine whether the number of suggestions and/or complaints a legislator receives affects

Table IX

Percentage of Respondents Indicating a Minus One or Lower Response for Specific Consumer Legislation

| Legislative Area | Percentage |
|---|---|
| Elimination of the Holder in Due Course Doctrine | 17.6 |
| Making false Advertising a Civil Offense | 5.1 |
| Permitting Class Action Suits | 21.0 |
| Prohibiting Pyramiding Sales Schemes | 9.2 |
| Adoption of the "Little FTC Act" | 13.5 |
| Closer Regulation of Warranties | 5.9 |
| Outlawing Bait and Switch Advertising | 8.4 |
| Controlling Going Out of Business Sales | 7.5 |
| Awarding Payment of Attorney Fees in Private Action Suits | 21.0 |
| Providing for the Possibility of Forfeiture of Fraudulent Company's Franchise | 13.5 |

the temper of his reply to the scalar question, a general, positive trend emerges. As might be expected, those legislators who received six or more petitions per month tended to favor the more positive end of the scale in their reply as compared to those who received fewer

complaints and/or suggestions. It is perhaps more important to note, however, that in no instance was there negative valence in the median profiles of respondents segregated by volume of petitions received per month.* The median profile of those few respondents (thirteen) who received no consumer complaints and/or suggestions was at least equal to or greater in positive valence than those legislators who received from one to five petitions per month. The exception was the reply to the nineth item (awarding payment of attorney fees in private action suits). This seems to indicate concern in the area of consumer protection, even though some legislators are not receiving any inputs from their constituents.

Reflecting on the profile of the responses to the mail survey, one might discount the non response of those twenty-two legislators who failed to respond to the questionnaire and speak of the "legislative majority" from those who replied to the direct mail inquiry. If one takes the most pessimistic position and assumes that those who did not reply to the questionnaire would have responded in the negative spectrum of the scale, the median profile of the universe, presented in Chart III, on the following page, still retains a positive valence overall. As contrasted to the median profile of those responding to the questionnaire, the fiftieth percentile or "legislative

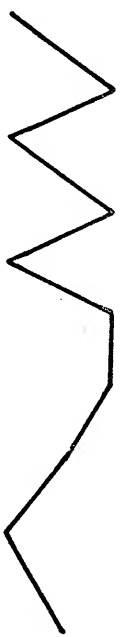
*These profiles are presented in Charts B-1 - B-4 in Appendix B.

majority" shows more indecisiveness on two factors--class action suits and the award of attorney fees in private action suits: otherwise, the profiles are identical.

Chart III

Median Profile as to Universe Attitude Toward Support of Specific Legislative Areas Assuming Non Respondents Would Have Replied Negatively

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of-business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |



The primary limitation of the above analysis is the inability to infer equal distribution of response to both houses in the "legislative majority's" attitudes toward the support of specific consumer protection measures. The profile of response discussed above also presents the most negative point of view--those who failed to respond to the questionnaire could well have responded in the positive range of reply and, possibly, their reply would have centered around the median or modal response of those legislators returning the questionnaires. It is impossible finitely to state that the suggested legislative areas will receive the majority vote in both houses necessary for the passage of bill through the legislature in Alabama; but these data do suggest that all ten of the described areas could pass the legislature given the proper introduction and individual support. It is true, possibly, that those areas receiving a neutral or ambivalent median response would meet with more resistance than those with positive valence; but the potential for passage through the legislature clearly exists.

Approximately 26 per cent of those legislators responding to the direct mail inquiry felt other consumer legislation should be considered in addition to those areas listed in the scalar question. An examination of the types of consumer legislation suggested by the lawmakers,

presented in Table X on the next page, reveals no definite pattern of response. When one observes the variety of suggestions as to possible consumer legislation, it is interesting to note that, at the present time, insurance rates are regulated by the Insurance Commission; that the statutes do provide for punitive damages for conscious fraud; and that small loan companies are regulated under the provisions of the "Mini Code." This points out that some legislators may not be as knowledgeable about state law as they are given credit for being.

Respondents' attitudes toward the two broad legal approaches to remedying problems of consumer abuse--the use of criminal versus civil penalties--were somewhat polar. Approximately 69 per cent of those legislators responding to the questionnaire favored the use of civil remedies as the means of overcoming problems involving the consumers' interest. Slightly over 19 per cent of the respondents stated that they preferred criminal over civil sanctions; and the remaining 12 per cent of the legislators who replied to the direct mail inquiry were noncommittal: they indicated that both types of remedy should be available. Generally, those who chose to explain their reasoning for supporting both measures suggested that criminal penalties be available to combat flagrant cases of consumer abuse, and that civil remedies be left open to administrators of consumer protection programs and the general public to correct the

Table X

Additional Areas of Consumer Legislation Suggested by Lawmakers

| Legislative Area | Number of Suggestions |
|---|---|
| Increase Liability of Credit Buyer | 3 |
| Regulate Insurance Rates | 3 |
| Require Express Warranty on All Durable Goods | 3 |
| Eliminate Present Office of Consumer Protection | 3 |
| Staunch Enforcement of Existing Statutes[a] | 3 |
| Establish Punitive Damages for Fraud | 2 |
| Regulate Physician and Hospital Fees | 2 |
| License of Auto and TV Repair Service | 2 |
| Regulate Small Loan Companies | 2 |
| Establish No Fault Insurance | 1 |
| Promote Self Regulation of Advertising by Media[a] | 1 |
| Repeal Mini Code | 1 |
| Regulation of Franchises | 1 |
| Improved Regulation of Used Car Dealers | 1 |
| Control of Fraudulent Sales Schemes | 1 |
| Control of Unfair Practices Through Business License | 1 |
| Establish Office of Ombudsman | 1 |

[a]It is recognized that these two suggestions do not involve legislative changes. They are presented here because respondents included them in response.

vast majority of cases involving false and misleading advertising and sales practices. Even with the apparent opposition, the "legislative majority" clearly supports the use of civil remedies over criminal sanctions to overcome problems of consumer abuse in the marketplace.

Perceived problems and remedies in protecting consumers

The majority of respondents (approximately 67 per cent) stated that they were not aware of any special problems which would make it difficult to protect the interest of consumers in Alabama. There was, however, a significant number of legislators who recognized certain barriers to effective consumer protection within the state. Those lawmakers who gave constructive replies were rather uniform in their answers. Some twenty-one respondents (17.6 per cent of all responses) stated that the low level of education in this state, particularly among the blacks, made it difficult to protect the interest of consumers. Similarly, some 10.1 per cent of all respondents stated more specifically that consumers were not educated or informed as to their "rights" in the marketplace. Here, response differed in that years of education was not the central point; it was content of education that was being stressed. Two respondents (1.7 per cent of all responses) indicated that problems arose out of poor socio-economic conditions, while the remaining 7.6 per cent of the

respondents cited "lobbies" or "special interest groups" to be a deterrent to protecting the consumers' interest.

The same legislators who recognized problems inherent in Alabama's environment which would make it difficult to protect the interest of consumers offered suggestions as to how these problems might be overcome. The proposed remedies to the listed deterrents to consumer protection are listed in Table XI below. Legislators indicating schooling as a remedy suggested a required course in the public school curriculum to remedy some of the problems of consumer abuse. Sequencing such a course may present difficulties, particularly for blacks, as the median years of schooling for persons twenty-five years and over was 10.8 years in 1970. Further investigation reveals that whites had a higher median (11.6 years) while blacks were significantly lower with a median of 8.1 years of schooling.[9]

Table XI

Respondents' Proposed Remedies to Deterrents of Consumer Protection

| Remedy | No. Responding | Per Cent of Total |
|---|---|---|
| Schooling | 32 | 59.3% |
| Publicity | 11 | 20.3 |
| Regulation of Lobby | 6 | 11.1 |
| Raise Standard of Living | 2 | 3.7 |
| Stricter Enforcement of Existing Statutes | 3 | 5.6 |
| Total | 54[a] | 100.00% |

[a]Total Response is greater than number of Legislators Recognizing Problems in Consumer Protection due to multiple replies.

Respondents suggesting publicity as a remedy to problems associated with protecting the consumers' interest indicated both the formal, paid use of informative media and public relations type releases through the various news media. These suggestions were geared more towards the present buying groups than the education of future buyers. The remaining eleven suggestions proffered by the legislators centered around raising the standard of living, stricter enforcement of existing statutes and the regulation of lobbyists.

## Complaints of Existing Agencies

The four governmental agencies on a state-wide level directly involved in protecting the interests of consumers in the area of false advertising and sales practices are the Office of Consumer Protection, the Attorney General, the Department of Banking and the Department of Insurance. Representatives of these agencies were personally interviewed to determine the nature and extent of problems confronting them in the performance of their perceived tasks. One complaint common to all centered around budgetary constraints and the resulting lack of manpower to adequately perform their duties relative to protecting consumer interests.*

*It is recognized that this may well reflect the true interests of the legislators as they ultimately allocate state funds to these tasks.

Office of Consumer Protection

In an interview with staff members of the Governor's Office of Consumer Protection several problem areas were enunciated. The foremost complaint centered around the most frequent type of consumer grievance--the failure of retail organizations to uphold the warranty on merchandise sold by them, particularly in the case of mobile homes and used automobiles. Field investigators related that few buyers had enough foresight to get verbal warranties in writing; thus there was little aid or assistance they could provide injured consumers. This recurring problem cannot be acted upon by the Office of Consumer Protection in any way except by notification to a vendor that a complaint has been filed against him for stated reasons and that the case is under investigation. In some instances this type of action corrects the situation; yet staff members definitely favored legislation which would require issuance of written warranties with the sale of durable goods and which would provide the law enforcement agencies with some legal means of enforcing its provisions. Currently, the Office of Consumer Protection is attempting to combat this type of consumer abuse through publicity aimed at the buyer--"Get It in Writing." This slogan is found in all public messages going out of the Office of Consumer Protection.

Field investigators likewise expressed concern over the growing number of complaints filed in the area of home

construction and maintenance work. Shoddy workmanship and inferior quality materials often form the basis for complaint. In most instances a formal contract is made between the parties specifying their duties. When complaints are filed in this area, the Office generally attempts to play the role of mediator between the parties in conflict. If no amiable solution is available, the Office then advises the injured party of the procedure to be followed in initiating a civil suit to rectify the problem.

Generally, the field investigators agreed that they were often powerless to effectively aid consumers (through legal process) whose individual rights have been violated in the transaction process. As was brought out in the previous chapter, the state cannot initiate actions in the behalf of private citizens.[10] Only when the interests of the public at large are involved can action be initiated. Thus, in many instances the Office of Consumer Protection is limited to coercion as the only means to aid injured consumers; but coercion often does not produce effective results. Field investigators were in strong support of legislation which would permit them to initiate some type of remedial action if a substantial number of individual injuries are reported against particular firms when clearly there is no involvement of the public interest.*

*M. Randolph Hicks, Jerry M. Pennington and Anita Hogg, Staff Members, Office of Consumer Protection, State of Alabama, personal interview, October 27, 1972.

The director of the Office of Consumer Protection, Annie Laurie Gunter, revealed yet another problem in administering the duties assigned to the Office by the Governor. There is an apparent conflict in roles between the Attorney General's Office and that of the Governor's Office of Consumer Protection. The Attorney General's authority which is vested in him by the Legislature binds upon that Office the beforementioned responsibilities in protecting the consumer from false advertising and sales practices. The Office of Consumer Protection, in contrast, was created by executive order. Furthermore its duties and responsibilities outlined in that order overlap those of the Attorney General. In cases where criminal action is necessitated, there is a question as to who should act. At present, there is little formal interchange between the two offices--each attempts to act on those complaints directed to them. On occasion, both have acted upon the same case which was reported to the separate agencies.*

Attorney General's Office

A primary complaint arising out of the Consumer Services Division of the Office of the Attorney General concerns its present inability to deter or prosecute effectively those sellers using the chain or pyramid sales

*Annie Laurie Gunter, Consumer Protection Officer, State of Alabama, personal interview, May 18, 1972.

scheme. During the first ten months of 1972, the Attorney General's Office received some sixty-four formal complaints in this area (all directed against Glenn Turner Enterprise). Under the present legal system in the State of Alabama, these cases are not actionable under criminal law. The criminal statutes on fraud do not encompass pyramid sales schemes where the possibility may exist for the purchaser to reap the "promised" profits: yet the probability of this occurring is very slim. Individuals, however, can initiate civil action against pyramid sales schemes under the statute of frauds and all complainants are advised of their rights by the Consumer Services Division.

The Office of the Attorney General reported that correspondence, secretarial, and computer schools ranked first in the number of complaints on file. In most cases reported, the promised facilities, quality of instruction, or guaranteed job placement did not materialize for the complainant. The Consumer Services Division feels that adequate legal remedies are available when mediation or threat of criminal prosecution does not suffice. The supposed reason for the volume of complaints in this area arises from the lack of manpower for effective enforcement against this type fraud and insufficient knowledge on the part of consumers (particularly low income consumers) to avoid this type of consumer fraud. The Director of the Consumer Services Division feels that this problem can

be partially overcome through the establishment of adequate consumer publicity by the Attorney General's Office directed toward this and other types of consumer abuse.

The Director of the Consumer Services Division also stated that warranties were a great source of consumer complaints. As with the Office of Consumer Protection, the failure of retailers and vendors to honor verbal or written warranties is beyond the scope of present legal protection. Little can be done by either bureau beyond the attempt toward mediation and advising the consumer as to private remedy. The inability to act in private cases or seek restitution for injured parties rather than criminal penalties was likewise cited as a limiting factor in carrying out its perceived duties to the public. While many cases of consumer abuse may be actionable in private suits, the probable gain of such action may not warrant the effort. Fear, inertia, or the lack of knowledge of his rights as an injured consumer likewise retard the use of private remedy.

In conjunction with the line of reasoning presented, the Director related that the task of proving intent or scienter in criminal cases is often quite difficult. As mentioned in the previous chapter, intent to defraud must be proved in criminal proceedings against fraud and false representations; merely showing that injury occurred

is not sufficient proof. Under the rules of procedure in civil court guilt as in criminal proceedings is not the central issue; rather, the effect of one's actions upon another is considered. Thus, in favoring the use of civil remedies against false advertising and sales practices the Attorney General or his appointee need only prove that injury occurred by certain specified acts rather than by proving the intent to injure as the office is presently required under criminal law.*

Department of Banking

The Superintendent of Banking, Mr. Robert H. Gullege, is charged with the responsibility of administering the provisions of the "Mini Code" along with other duties. As was pointed out in the previous chapter, in the discussion on the "Mini Code" (page 79), the protection of the buyer's right to cancel home solicitation sales is the responsibility of the Department of Banking. In the administration of this specific duty, the Department of Banking has been called upon numerous times by both consumers and house-to-house vendors for specific interpretation of the cancellation provision of the "Mini Code." The problems with which this Department has been confronted in enforcement of this provision is in those instances of home solicitation where cash rather than

*Tom Brassell, Assistant to the Attorney General of the State of Alabama, personal interview, November 30, 1972.

commercial paper is used as a numerare of exchange. In this type situation the Department is operating outside its sphere of experience. Another consumer agency with established lines of communication may be better equipped to handle this special type of complaint. When commercial paper is involved, the Department of Banking can obtain effective cooperation through licensed lending institutions by virtue of the control which it exerts over them; yet the sanctions which the Department of Banking is able to utilize against a licensed lending agency are not available against the door-to-door vendor alone. Those few complaints which have been filed with the Banking Department under this cancellation provision have been effectively settled through mediation rather than by court action initiated by the Department or an individual consumer. There is some question, however, as to whether some consumers forfeit their right to cancel through the signing of a pre-dated sales agreement.

The question of the "Mini Code's" provision concerning the holder in due course doctrine was also discussed. As mentioned in an earlier section of this paper (page 78), the "Mini Code" states that the "assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arisen, out of the sale or lease in the absence of an agreement to the contrary . . . ."[11]

Such special exclusion is a standard practice of vendors marketing commercial paper to financial institutions. The State Department of Banking has not received any complaints in this area due to this common practice in the wording of credit contracts.*

Department of Insurance

The Investigative Division of the Department of Insurance, headed by J. H. Eastwood, averages some 180 complaints per month from consumers and competitors who feel victimized by unfair or deceptive practices or methods of competition in the insurance industry. The Department of Insurance can impose fines and penalties as well as suspend the firm's license to sell insurance in this state upon proof of firm's using an unfair or deceptive advertisement or selling practice. Suspensions of license are subject to appeal in the state court system; however, this type of appeal is rarely used.

The major sources of complaint arise out of mail order insurance, the representations concerning hospital and disability insurance and the sale of credit life policies. The Investigative Division claims voluntary compliance in approximately 95 per cent of the cases involving valid claims. The remaining 5 per cent

*Robert Gullege, Superintendent of Banking, State of Alabama Banking Department, personal interview, October 4, 1972.

comply only when sanctions force them to do so. The sole problem perceived by the Investigative Division, in performing its duty is the varying interpretation given to "unfair or deceptive methods of competition or an unfair or deceptive act or practice in the business of insurance." Even though the Federal Trade Commission rulings are taken by the Insurance Department as precedents, it is often difficult to adjudge the deleterious effects of certain acts.*

In summary, both the legislators who responded to the questionnaire and the administrators of consumer programs who were interviewed personally perceived that consumer protection in Alabama is in need of improvement. Legislative needs and funding problems have been discussed in this chapter. The following chapter, which presents an overview of consumer protection legislation in all fifty states, examines the manpower and resources devoted to the task of protecting the interests of consumers.

*J. H. Eastwood, Investigative Division, State of Alabama, Department of Insurance, personal interview, October 4, 1972.

NOTES

[1]G. David Hughes, Attitude Measurement for Marketing Strategies (Glenview: Scott, Foresman & Co., 1971), p. 95.

[2]Irving Crespi, "Use of Scaling Techniques in Surveys," Journal of Marketing, Vol. XXV, No. 3 (July, 1961), p. 70.

[3]Fred N. Kerlinger, Foundations of Behavioral Research (New York: Holt, Rinehart & Winston, 1964), p. 572.

[4]Hughes, p. 95.

[5]Hughes, ibid.; Lester A. Neidell, "The Use of Non Metric Multidimensional Scaling in Marketing Analysis," Journal of Marketing, Vol. XXXIII, No. 4 (October, 1969), pp. 37-43.

[6]Paul E. Green and Donald S. Tull, Marketing Research for Decisions (2nd ed. Englewood Cliffs: Prentice-Hall, Inc., 1970), p. 178.

[7]Ibid., pp. 120-124.

[8]Mark V. Nadel, The Politics of Consumer Protection (New York: Bobbs-Merrill Co., 1971), pp. 36-38.

[9]1970 Census of Population: General Social and Economic Characteristics - Alabama (Washington, D. C.: Government Printing Office, 1972), pp. 2-163.

[10]William Mack and William B. Hale, ed., Corpus Juris, Vol. VI (New York: The American Law Book Co., 1918), pp. 812-814.

[11]5 Ala. Code 321.

[12]28 Ala. Code 90(3).

## CHAPTER V

## OVERVIEW OF CONSUMER PROTECTION IN THE FIFTY STATES

The previous chapter examined the various problem areas in protecting consumers from false advertising and selling practices within the State of Alabama and determined, generally, legislative support for remedying these problems. This chapter looks at the body of legislation in force in the other forty-nine states of the Union and examines the resources and machinery utilized to protect the consumers' interest. Also, the experiences and problems encountered in protecting the consumer in other states will be highlighted. Primary data included in this chapter were collected by direct mail questionnaire sent to the chief administrative officer of the designated consumer protection agencies or to the Attorney General in those few states having no such specified office.

### Survey of Legislative Action

The development of state legislation to combat false and misleading advertising and sales practices has historically been piecemeal--attacking specific practices which through repetitive use, gain the attention of

state legislative bodies. The earlier examination of the existing body of laws in the state of Alabama (Chapter IV) displays the pattern of legislative development in consumer protection common in most states prior to the 1960's. All states have traditionally developed criminal statutes as a primary means of combating fraudulent business practices. Criminal and civil statutes pertaining to fraud and misrepresentation are essentially the same in the fifty states of the Union. This basic type of legislation has been incorporated within the body of state law since the early beginnings of American jurisprudence.

The Printer's Ink model statute which was drafted in 1911 is an example of common legislation invoking criminal penalties for violation of the statute. The states of Delaware and New Mexico are the only states which have not adopted some form of this proposed legislation. Arkansas, the last state to pass it, waited until 1967 to initiate action in this area.[1] Thirty-three states have the extended form of the statute (presented in Chapter III, pages 64-66) which does not require proof that the defendant intended to deceive or that he had knowledge of the falsity. Eleven states (California, Florida, Maryland, Massachusetts, New Hampshire, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Vermont) require proof "beyond a reasonable doubt" that the defendant had prior knowledge of the falsity of statements made in his advertisement; and four states (Arizona, Maine, North

Carolina and South Carolina) demand proof that the defendants intended to deceive in his advertising message. The positive effect of such legislation, regardless of which version was adopted, is quite questionable as there is little, if any, effort made by the various attorneys general or local prosecutors to enforce these statutes.[2]

As with the Printer's Ink model statutes it has been generally conceded that "attacking fraud in the marketplace with criminal sanctions has been patently unsuccessful."[3] This problem is due to the traditional reluctance on the part of state and local officials and juries to apply and enforce criminal statutes to "white collar crimes."[4] Individual action alone, initiated under civil statutes has, likewise, not proved too successful. The following depicts why:

> The discontent is rooted in the fundamental problem that, from the standpoint of individual consumers, our commercial law has too often provided unreliable and uneconomic access to justice. Whereas the established commercial law has provided an acceptable regime of contracts and remedies for businessmen, consumers have prohibitive costs in obtaining access to comparable commercial justice. In most consumer controversies the risks and expenses of investigation, council, and litigation far outweigh the likely recoveries that could reasonably have been anticipated with traditional actions for warranty, misrepresentation, and fraud. . . . under the traditional rules of the game, it was less expensive to suffer most deceptive trade practices than to remedy them through legal action.[5]

The Federal government attempted to correct the schism between its inherent reluctance in initiating criminal proceedings in consumer transaction problems and the pitfalls of private remedies by enacting in 1938 the Wheeler-Lea Amendment to the Federal Trade Commission Act. This Act provided for civil remedies against "deceptive acts or practices" as an avenue of administrative action. The Federal Trade Commission needs only to establish that injury occurred or was likely to occur from certain unfair or deceptive acts to obtain relief rather than to prove criminal intent to injure. Likewise, "the opprobrium attached to an adverse verdict and assessment of a civil fine is significantly less than that which attaches in a criminal proceeding and perhaps as a result, this remedy is more commonly pursued where there is a choice to be made between criminal and civil sanction . . . ."[6]

Recent Deceptive Trade Legislation

It was not until 1961 that any of the states elected to pursue this type of remedy in consumer transaction problems. The states of Washington and Illinois enacted separate pieces of legislation as pioneers in this area. Washington passed its Unfair Business Practices and Consumer Protection Act.[7] It was modeled directly after section five of the amended Federal Trade Commission Act in providing that "unfair methods of competition and

unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Illinois statute utilized a slightly different approach in stipulating that

> The Act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been mislead, deceived or damaged thereby is declared to be an unlawful practice, . . . that nothing herein contained shall apply to any advertisement which is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission.[8]

In both instances, the responsibility for protecting the public from these loosely defined unfair business practices was vested in the attorney general along with the administrative machinery to accept voluntary compliances, seek injunctive relief and impose civil fines for violation of these statutes. In 1964 New Jersey modeled its consumer protective code after that of Illinois. The following year, five states (Connecticut, Delaware, Hawaii, Iowa, and Oregon) passed similar legislation. Today some thirty-seven states have enacted comprehensive legislation which embodies civil procedures for the appointed agency to remedy problems of consumer abuse.

Data in Table XII, presented on the following page, give an overview of the various types of consumer legislation states have recently passed to combat false and misleading advertising and selling practices and related consumer abuses. Nine states have enacted Alternative 1 of the model legislation proposed by the Council of State Governments.[9] This is often referred to as the "little FTC Act" and, as the above wording in the legislation of the state of Washington pointed out, it attacks anti-competitive as well as deceptive trade practices which prey upon the consuming public. Eleven states have adopted some modification of the "little FTC Act." Alternative 2, as these versions are often referred to, attacks only the "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce."[10] Apparently, the legislative bodies in these states felt that they had sufficient legislation to deal with anti-competitive practices and that it would have been redundant to include "unfair methods of competition" within their consumer protection packages. Both of these legislative approaches key upon the experiences and interpretations of the Federal Trade Commission in loosely defining the type of practices which are illegal.

The third type of declaratory provision is more commonly found. At present, a total of eighteen states have adopted some version of Alternative 3 of the Suggested

Table XII

Consumer Protection Legislation Affecting
False and Misleading Advertising and Sales Practices
In the Fifty States

| Legislation | AL | AK | AZ | AR | CA |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | | ALT. 3 (1970) | ALT. 2 (1967) | ALT. 2 (1971) | ALT. 3 (1971) |
| Maximum Civil Penalties | | $25,000 | $10,000 | $250[a] | $2,500 |
| Suspension or Forfeiture of Corporate Franchise | | | X | X | X |
| State Action for Restitution | | X | X | X | X |
| Private Remedy | | X | Implied[b] | | X |
| Award of Attorney's Fee and Court Cost | | X | | | X |
| Punitive Damages | | Treble | | | Ct. Dis.[c] |
| Class Action Suits | Aty.Gen.[d] | X | Aty.Gen. | Aty.Gen. | X |
| Cooling-Off Period | Limited | X | X | | X |
| Holder in due course | X | X | X | | |
| Pyramid Sales Schemes | | | | X | X |
| Warranty Regulation | | X | | X | X |
| Bait and Switch | | X | | X | X |
| Going Out of Business | | X | | X | X |
| Referral Sales | X | X | X | X | |
| Odometer Tampering | | | | | X |
| Unsolicited Goods | | | | | |
| Courses of Instruction | | | | | |

[a]Criminal penalties only
[b]Administrative action does not bar private remedy
[c]At court's discretion
[d]Class action may be initiated by Attorney General only.

Table XII--continued

| Legislation | CO | CT | DE | FL | GA |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 3 (1969) | ALT. 3 (1965) | ALT. 3 (1965) | ALT. 3 (1970) | |
| Maximum Civil Penalties | $10,000 | | | $1,000 | |
| Suspension or Forfeiture of Corporate Franchise | | | X | | |
| State Action for Restitution | | X | X | | |
| Private Remedy | X | X | | X | |
| Award of Attorney's Fee and Court Cost | Ct. Dis. | X | | Ct. Costs (only) | |
| Punitive Damages | | | | | |
| Class Action Suits | Aty.Gen. | | Aty.Gen. | X | |
| Cooling-Off Period | X | X | X | X | X |
| Holder in due course | X | X | | | |
| Pyramid Sales Schemes | | | | X | |
| Warranty Regulations | | X | X | | |
| Bait and Switch | X | X | X | X | |
| Going Out of Business | | X | X | X | |
| Referral Sales | | | | | |
| Odometer Tampering | | | | X | |
| Unsolicited Goods | | | | X | |
| Courses of Instruction | | | X | | |

Table XII--continued

| Legislation | HI | ID | IL | IN | IA |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 1 (1965) | ALT. 3 (1971) | ALT. 2 (1961) | ALT. 3 (1971) | ALT. 2 (1965) |
| Maximum Civil Penalties | $2,500 | $10,000 | | | |
| Suspension or Forfeiture of Corporate Franchise | X | X | X | X | |
| State Action for Restitution | X | X | X | X | X |
| Private Remedy | X | X | Implied | X | |
| Award of Attorney's Fee and Court Cost | X | Ct. Dis. | | X | |
| Punitive Damages | Treble | Ct. Dis. | | X | |
| Class Action Suits | X | Aty.Gen. | | X | Aty.Gen. |
| Cooling-Off Period | X | X | X | X | |
| Holder in due course | X | X | | X | |
| Pyramid Sales Schemes | X | | | | X |
| Warranty Regulation | X | | | X | |
| Bait and Switch | X | X | X | X | |
| Going Out of Business | | X | X | X | X |
| Referral Sales | | | | X | |
| Odometer Tampering | | | | X | |
| Unsolicited Goods | | | | | |
| Courses of Instruction | | | | X | |

Table XII--continued

| Legislation | KS | KY | LA | ME | MD |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 2 (1968) | ALT. 2 (1972) | ALT. 1 (1971) | ALT. 1 (1970) | ALT. 2 (1967) |
| Maximum Civil Penalties | $10,000 | $25,000 | $5,000 | $10,000 | $1,000[1] |
| Suspension or Forfeiture of Corporate Franchise | | X | | | |
| State Action for Restitution | X | X | X | X | X |
| Private Remedy | | X | X | | |
| Award of Attorney's Fee and Court Cost | | | X | | |
| Punitive Damages | | | Treble | | |
| Class Action Suits | Aty.Gen. | Aty.Gen. | | Aty.Gen. | |
| Cooling-Off Period | | X | | X | X |
| Holder in due course | | | | X | X |
| Pyramid Sales Schemes | | X | | X | X |
| Warranty Regulation | | | | | X |
| Bait and Switch | | | X | | X |
| Going Out of Business | | X | X | | |
| Referral Sales | | X | | X | X |
| Odometer Tampering | | | | X | |
| Unsolicited Goods | | X | | | |
| Courses of Instruction | X | | | | |

Table XII--continued

| Legislation | MA | MI | MN | MS | MO |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 1 (1967) | HB3598[e] (1965) | ALT. 2&3 (1971) | | ALT. 2 (1967) |
| Maximum Civil Penalties | $10,000 | $1,000 | | | $5,000 |
| Suspension or Forfeiture of Corporate Franchise | X | | | | X |
| State Action for Restitution | X | | | | X |
| Private Remedy | X | | X | | Implied |
| Award of Attorney's Fee and Court Cost | X | | X | | |
| Punitive Damages | Treble | | | | |
| Class Action Suits | X | | Aty.Gen. | Aty.Gen. | X |
| Cooling-Off Period | X | X | X[f] | | |
| Holder in due course | Autos Only | X | Limited | | |
| Pyramid Sales Schemes | X | X | X | | |
| Warranty Regulation | X | | X | | |
| Bait and Switch | X | X | X | | |
| Going Out of Business | X | | | | X |
| Referral Sales | X | | X | | |
| Odometer Tampering | X | | | | |
| Unsolicited Goods | X | X | X | | X |
| Courses of Instruction | X | | | | |

[e]Outlaws untrue, deceptive or misleading advertising; 19 Mich. Stat. Ann. 853(1)-(9).
[f]Applies to trade and correspondence schools only.

Table XII--continued

| Legislation | MT | NB | NV | NH | NJ |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | | | | ALT. 3 (1970) | ALT. 2 (1964) |
| Maximum Civil Penalties | | | | $10,000 | $5,000 |
| Suspension or Forfeiture of Corporate Franchise | | | | X | X |
| State Action for Restitution | | | | X | X |
| Private Remedy | | | | X | X |
| Award of Attorney's Fee and Court Cost | | | | X | X |
| Punitive Damages | | | | | Treble |
| Class Action Suits | Aty.Gen. | | | | Aty.Gen. |
| Cooling-Off Period | | | | X | |
| Holder in due course | | | | | |
| Pyramid Sales Schemes | | | X | | |
| Warranty Regulation | | | X | | |
| Bait and Switch | | | | X | X |
| Going Out of Business | | | | X | |
| Referral Sales | | X | X | | |
| Odometer Tampering | | | X | X | X |
| Unsolicited Goods | | | X | X | |
| Courses of Instruction | | | | X | |

Table XII--continued

| Legislation | NM | NY | NC | ND | OH |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 3 (1967) | ALT. 3 (1970) | ALT. 1 (1969) | ALT. 2 (1972) | USCPA (1972)[g] |
| Maximum Civil Penalties | $5,000 | | $2,500 | $500 | $5,000 |
| Suspension or Forfeiture of Corporate Franchise | | X | | | |
| State Action for Restitution | | X | X | | |
| Private Remedy | Inj.Only[h] | | X | | Recission[i] |
| Award of Attorney's Fee and Court Cost | X | | | Implied | |
| Punitive Damages | | | Treble | | |
| Class Action Suits | Aty.Gen. | | | | Aty.Gen. |
| Cooling-Off Period | | X | X | | |
| Holder in due course | X | X | X | | |
| Pyramid Sales Schemes | | | X | | |
| Warranty Regulation | | | | | |
| Bait and Switch | X | X | | X | X |
| Going Out of Business | X | | | | |
| Referral Sales | X | | X | | |
| Odometer Tampering | | | X | | |
| Unsolicited Goods | | X | | | |
| Courses of Instruction | | | | | |

[g]Injunctive relief is the only private remedy available.
[h]Uniform Consumer Sales Practices Act, 1345 Ohio Rev. Stat. 1-13.
[i]USCPA provides for recission of unconscionable contracts.

Table XII--continued

| Legislation | OK | OR | PA | RI | SC |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | | ALT. 3 (1965) | ALT. 3 (1968) | ALT. 3 (1968) | ALT. 1 (1971) |
| Maximum Civil Penalties | | $5,000 | $5,000 | $10,000 | $15,000 |
| Suspension or Forfeiture of Corporate Franchise | | X | X | X | X |
| State Action for Restitution | | X | | | |
| Private Remedy | | X | | X | X |
| Award of Attorney's Fee and Court Cost | | X | | | X |
| Punitive Damages | | Ct. Dis. | | | Treble |
| Class Action Suits | Aty.Gen. | | Aty.Gen. | X | Aty.Gen. |
| Cooling-Off Period | X | X | X | X | |
| Holder in due course | X | X | | | |
| Pyramid Sales Schemes | | | X | | X |
| Warranty Regulation | | | | | X |
| Bait and Switch | | X | X | X | X |
| Going Out of Business | | | X | | |
| Referral Sales | | X | X | | |
| Odometer Tampering | | | X | | |
| Unsolicited Goods | | | | | |
| Courses of Instruction | | | | | |

Table XII--continued

| Legislation | SD | TN | TX | UT | VT |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 3 (1971) | | ALT. 3 (1967) | | ALT. 1 (1967) |
| Maximum Civil Penalties | $10,000 | | $10,000 | | $10,000 |
| Suspension or Forfeiture of Corporate Franchise | X | | | | X |
| State Action for Restitution | X | | | | X |
| Private Remedy | | | | | X |
| Award of Attorney's Fee and Court Cost | | | | | X |
| Punitive Damages | | | | | Ct. Dis. |
| Class Action Suits | Aty.Gen. | Aty.Gen. | | | |
| Cooling-Off Period | X | | | | X |
| Holder in due course | | | | | X |
| Pyramid Sales Schemes | X | | | | X |
| Warranty Regulation | | | X | | X |
| Bait and Switch | X | | X | | |
| Going Out of Business | | | X | | X |
| Referral Sales | X | | | | |
| Odometer Tampering | | | | | |
| Unsolicited Goods | X | | | | X |
| Courses of Instruction | | | | | |

Table XII--continued

| Legislation | VA | WA | WV | WI | WY |
|---|---|---|---|---|---|
| Comprehensive Consumer Protection Act | ALT. 3 (1970) | ALT. 1 (1961) | | ALT. 1 (1970) | |
| Maximum Civil Penalties | | $25,000 | | $10,000 | |
| Suspension or Forfeiture of Corporate Franchise | X | X | | X | |
| State Action for Restitution | | | | X | |
| Private Remedy | | X | | X | |
| Award of Attorney's Fee and Court Cost | | X | | X | |
| Punitive Damages | | Treble | | | |
| Class Action Suits | Aty.Gen. | X | | Aty.Gen. | |
| Cooling-Off Period | X | X | | X | X |
| Holder in due course | | X | | X | X |
| Pyramid Sales Schemes | X | | X | X | |
| Warranty Regulation | | | | | |
| Bait and Switch | X | | | | |
| Going Out of Business | X | | | | |
| Referral Sales | | | | X | X |
| Odometer Tampering | X | | | | |
| Unsolicited Goods | | X | | | |
| Courses of Instruction | | | | | |

Source: This table was compiled through the use of direct mail questionnaires; the Codes of the various states; Office of Consumer Affairs, State Consumer Action - Summary '71 (Washington, D. C.: Government Printing Office, 1972); National Association of Attorneys General, State Programs for Consumer Protection (Raleigh: National Association of Attorneys General, 1972).

Legislation. (Note from Table XII that the state of Minnesota has enacted legislation into law encompassing both alternatives two and three.) Its intent is essentially the same as the other two alternative forms, yet it gives a more precisely defined view of what constitutes unlawful conduct:

(1) passing off goods or services as those of another;

(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing likelihood of confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or

(13) engaging in any act or practice which is unfair or deceptive to the consumer.[12]

The states of California, Indiana, Oregon, and Virginia have modified the above provisions to suit their particular needs within their boundaries. The Connecticut Act omits clauses nine and ten which pertain to bait and switch advertising as this practice is governed by earlier legislation. Florida* and New Hampshire have deleted provisions twelve and thirteen of the above; while Alaska, Colorado, Minnesota, New Mexico and South Dakota have not included the catchall provision (clause thirteen). The deletion of either of the last two provisions of the suggested code, particularly section thirteen, greatly restricts the effectiveness of such legislation by rigidly defining the boundaries of deceptive trade practices.

Those states which have enacted some version of Alternative 3 of the Suggested Legislation have adopted section four of the model code (presented in Appendix C). Essentially this section exempts broadcast and print media and their agents from prosecution for the unlawful conduct of their advertisers except where the media had prior

*The state of Florida is also unique in that it eliminates the word "likelihood" in Clauses two and three of the uniform act and includes in its introduction to deceptive trade practices the requirement that the person know, or in the exercise of due care should know of the unlawfulness of his actions; 817 Fla. Stat. Ann. 80.

knowledge of the falsity, helped prepare the advertisement, or had direct financial interest in the distribution or sale of the product or service. The states of Idaho, Minnesota, New Mexico, Oregon, and Texas exclude public utilities from this legislation. Texas likewise expressly excludes insurance companies from these provisions as its legislature apparently feels that its insurance commissioner adequately represents consumer interests.

Regardless of the general form of the act prohibiting false and misleading advertising and selling practices (Alternative 1, 2, or 3), the common feature of all the thirty-seven states which have passed comprehensive consumer protection legislation is that these states provide the authority for the program administrator (most often the Attorney General) to investigate possible violations and obtain injunctions to bar further action by the defrauding party. The administrators of these laws are likewise given power to accept voluntary compliance when this appears to be the best remedy or to pursue more stringent remedies if the case necessitates. Those states which have set definite limits upon the magnitude of civil penalties and the amount of such fine for each violation of their deceptive trade laws are shown in Table XII. Also excepting the two states which only impose criminal fines and penalties (Arkansas and Maryland) it is interesting to observe the wide range of penalty ($500 to $25,000) assumed sufficient to deter further deceptive practices.

State Initiated Action

All states can control the actions of firms which are operating within their boundaries to a certain degree through the renewal procedures on business licenses; yet this type of remedy may be quite difficult unless explicit provisions are available. Twenty-three of the thirty-seven states which have enacted comprehensive consumer legislation expressly provide for the possibility of suspension or forfeiture of corporate franchises or licenses of those firms which are found guilty of violating their consumer protection acts. Only eight states (Arizona, Delaware, Illinois, Kansas, Maryland, New Jersey and North Dakota) have explicit provisions for receivership--a remedy usually reserved for the most flagrant violators.

Those twenty-six states which provide that the administrator of consumer protection programs may seek restitution for injured consumers from the defrauding firm are listed in Table XII. This type provision represents a distinct departure from the general body of laws relating to the action of the Attorney General and similar administrative officers. Traditionally, corrective as contrasted to remedial action, has been the modus operandi.

Private Remedies

A fewer number of states (twenty-two) provide for private remedies within their consumer legislation. In

Colorado, Florida, Minnesota, Rhode Island, South Carolina and Washington compensatory judgments are available only through private action. The attorney general or other protection officer cannot initiate state action for restitution to injured consumers. New Mexico law provides the obtainment of an injunction as the only means of action; restitution is not an available consumer remedy. In Ohio, the plaintiff is afforded the right to rescind the contract; restitution is likewise not available. The states of Arizona, Illinois, Missouri, and North Dakota, while not expressly providing the right to private action, do specifically state that action initiated by the program administrator does not bar private suits; thus these states imply that such action is available. Of those states which have passed comprehensive consumer legislation only New Mexico, Pennsylvania, Texas and Virginia do not provide for the possibility of remedial action to compensate for the actual damage inflicted by outlawed practices.

Sixteen of those states which allow private action suits provide for the payment of court costs and attorney's fees to the successful plaintiff by the defendant. The states of Colorado and Idaho rely on the courts' discretion in determining whether the defendant should be forced to pay these costs; and Florida provides for the payment of court costs only. The basic reasoning behind such provisions is help for the plaintiffs to overcome the cost barrier in

initiating legitimate private action; yet these provisions foil harrasment suits by having the unsuccessful plaintiff bear the costs incurred in bringing the defendant to court. Punitive damages awarded in twelve of the states with comprehensive consumer legislation likewise serve the function of offsetting the risks and costs involved in consumer litigation. However, the treble damage provision* in eight of these states may encourage persons to file claims without valid grounds for action.[13]

Class Action Suits

Class action suits also tend to encourage consumer litigation. The mechanism for this type procedure exists in all states; yet the stringent procedural requirements, as shown below, make class actions almost impossible to implement in consumer transaction problems.[14] Section twenty-three of the Federal Rules of Civil Procedure followed in virtually all states permit a class action only if

> (1) The class is so numerous that joinder of all members is impractible, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class . . . . Also class action does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.

*The state of Hawaii establishes a minimum recovery of $1,000, whereas Washington state establishes this level as its maximum. Alaska and South Carolina allow for treble damages only after willful intent has been proven.

In light of the above, nine states (as shown in Table XII) have passed legislation which facilitates class actions in situations involving consumer abuses. Some twenty-three other states have provisions whereby the attorney general may initiate class action paren patriae when the public interest is clearly involved in problems of consumer abuse.

Cooling-Off Period

In addition to a comprehensive consumer protection bill, most states have legislation which provides for a means of thwarting specific types of consumer abuses. Most numerous of these specific provisions is the establishment of a cooling-off period for home solicitation sales. As mentioned in Chapter III, page 78, this type provision enables a consumer to cancel a sales contract for goods or services within a specified period of time, usually seventy-two hours. Thirty-one states which have followed the precedent established by the Federal Trade Commission's trade practice rule have passed such legislation. The State of Massachusetts has enacted a limited version of this bill in providing for a three-day cooling-off period for automobiles purchased in the special instance where the sale was made at a location other than the vendor's normal place of business.[15] It likewise allows for cancellation provisions in all home solicitation contracts in which a consumer's residence is put up as security on the sales and finance contract.[16] The State of

Minnesota likewise restricts its cooling-off provision by limiting it only to those contracts pertaining to trade schools and courses of instruction.[17] Those states which have enacted cooling-off provisions generally require a specific statement, clearly explaining the rights of the buyer, to be included as an integral part of the sales agreement. Exclusion of such written statement makes the seller subject to civil penalties.

Holder in Due Course

The holder in due course doctrine as applied to consumer credit transactions is controlled by specific legislation in a total of twenty-two states. Most states simply make all assignees of consumer paper subject to the claims and defenses of the buyer and stipulate that consumer paper be conspiculously marked. The holder in due course doctrine is not construed as being applicable to consumer paper in those instances where the buyer arranged his financing independently of the seller and where the goods are not held as chattel. The State of Massachusetts limits its exclusion of the holder in due course to automobile paper only,[18] whereas Alabama (as mentioned earlier) and Minnesota limit the effectiveness of their prohibition by providing that the assignee of consumer paper is liable to the claims of the buyer or lessee as if he had entered into the sale or lease himself unless there is a specific agreement to the contrary in the sales contract.[19]

Pyramid Sales and Warranty

The chain or pyramid sales scheme is outlawed in twenty states. Much of this legislation directed against multi-level distributorships is of recent vintage, being specifically enacted to combat the widespread use of this predatory practice by Glenn Turner Enterprises, et al. Fourteen states have passed recent legislation which requires that vendors give express warranties to purchasers of many durable goods and invokes sanctions (civil fines) against those manufacturers and vendors who do not adequately service warranted goods.

Bait and Switch and Going-Out-Of-Business Sales

The practice of bait and switch advertising is outlawed in thirty states. Those states which have adopted Alternative 3 of the Suggested Legislation utilize civil penalties as a means of combating this deceptive practice, whereas, a limited number of the remaining states attempt to invoke criminal penalties against vendors who employ this practice. Criminal sanctions would be most difficult to levy as bait and switch tactics are difficult to police as "intent" to defraud must likewise be proved. A related area of fraudulent advertising--going-out-of-business sales--is regulated to a varying degree in all states. Seventeen states provide their consumer protection agencies with

civil remedies as a means of controlling the above practice.

Referral Sales

Seventeen states, including Alabama, prohibit the use of referral sales schemes. It is interesting to note that in ten of these states pyramid sales schemes are specifically listed along with referral sales as deceptive selling practices to be outlawed. Although these two practices are not often utilized together in fraudulent sales schemes, they both "promise" lucrative reward to the unsuspecting purchaser.

Other Prohibited Practices

There are other common legislative controls over selling practices. Twelve states have recently enacted legislation directed against the shady practice of odometer tampering. These twelve states, as shown in Table XII, expressly prohibit the alteration of recorded vehicle mileage and impose civil fines for violation of this code. California, Florida and New Hampshire further require that a notarized statement of actual mileage accompany the certificate of title in the sale of used automobiles. New Jersey encourages defrauded buyers to institute private action against odometer tampering by awarding treble damages in addition to the possible refund of the purchase price of the automobile

to the successful plaintiff. Those twelve states which have passed statutes pertaining to unordered merchandise are also listed in Table XII. The common approach is to allow the recipient of unsolicited merchandise to treat such goods as a gift. He thus eliminates the oft assumed need to return the goods or place unordered merchandise in safekeeping.

Five states, Delaware, Iowa, Kansas, Massachusetts and New Hampshire, have designed specific bills to regulate non-public trade, business and correspondence schools. Essentially, these statutes require licensing of such courses of instruction and establish the procedure of policing fraudulent or unethical means of soliciting student applicants. California recently passed legislation which created a Bureau of Automotive Repair within its Department of Consumer Affairs. Automotive repair shops must register with this bureau and their "right to do business" within the state may be withdrawn upon substantive proof of their use of deceptive trade practices or fraud. Connecticut and Rhode Island have similar statutes requiring the licensing of persons engaged in automotive repairs. In regard to specific licensing statutes, the states of California, Connecticut, Florida, Indiana, Louisiana, Massachusetts and Oregon require licenses for all business making repairs on TV's and similar electronic equipment. Florida goes further in

its requirements by outlawing false advertising, exceeding estimated costs of repairs over a stated percentage, and nondisclosure of the fact that a rebuilt television tube is placed in a set.[20]

## Survey of Administrative Organizations

A necessary adjunct to a sound legislative program is an effective consumer protective agency. The brief questionnaire (found in Appendix D) mentioned at the onset of this chapter, was sent to the administrators of the various agencies to determine the organizational structure, resources and activities of each unit. Replies were received from thirty-four states. Some secondary data were available to assist in obtaining a more complete picture of the various agencies and their resources.

Data in Table XIII, presented on the next page, provide the reader with an overview of the organization of the various state agencies, their resources, and the number of complaints they are processing. At present, there are only three states--Montana, Tennessee, and Wyoming--which have no established agency or division created to protect the interests of its citizens. If one compares the number of officially recognized and budgeted agencies with the number of states which have enacted comprehensive consumer legislation, it is evident that some state agencies are attempting to operate

## Table XIII

### Location, Staffing, Funding and Activity Measures of State Consumer Protection Agencies

| State | Name and Location of Consumer Protection Offices | Staff[a] | | | | Annual or Fiscal Budget | | Approx. No. Complaints Received/mo. |
|---|---|---|---|---|---|---|---|---|
| | | Attorneys | Investigators | Secretaries | Others[b] | Dollar Amount | Cents per capita[c] | |
| AL | Consumer Services Section (Aty.Gen.) Consumer Affairs Office (Office of Governor) | 1/2 | 4 | 3 | 1 | $ 75,000 | 2.18 | 475 |
| AK | Department of Law (Aty.Gen.) | 2 | 1 | 2 | | 105,000 | 34.96 | |
| AZ | Consumer Fraud Division (Aty.Gen.) | 3-1/2 | 4 | 2 | | 112,000 | 6.32 | 40 |
| AR | Consumer Protection Division (Aty.Gen.) | 1 | 2 | 1 | | 40,000 | 2.08 | |
| CA | Consumer Fraud Section (Aty.Gen.) Dept. of Consumer Affairs (Independent Agency) | 14 | - | - | | | | 2,000 |
| CO | Office of Consumer Affairs (Aty.Gen.) | 3 | 1 | 3 | 4 | 150,000 | 6.80 | |
| CT | Dept. of Consumer Protection (Independent Agency) | - | 9 | 1 | | 88,000 | 2.90 | 225 |
| DE | Division of Consumer Affairs (Independent Agency) | - | 4 | 3 | | 40,000 | 7.30 | 150 |

[a] Part-time employees were assumed to equal 1/2 full-time equivalent.
[b] This category includes education specialists, public relations personnel and special administrative positions. Work study students were not counted as full time staff.
[c] Computed on basis of 1970 Census of Housing and Population figures.

Table XIII--continued

| State | Name and Location of Consumer Protection Offices | Staff[a] | | | | Annual or Fiscal Budget | | Approx. No. Complaints Received/mo. |
|---|---|---|---|---|---|---|---|---|
| | | Attorneys | Investigators | Secretaries | Others[b] | Dollar Amount | Cents per capita[c] | |
| FL | Division of Consumer Affairs (Department of Agriculture) | - | 6 | 5 | 1 | $ 170,619 | 2.51 | 300 |
| GA | Consumer Services Unit (Independent Agency) | | | | | | | |
| HI | Office of Consumer Protection (Office of Governor) | 3 | 7-1/2 | 5 | 2 | 242,602 | 31.57 | 242 |
| ID | Consumer Protection Division (Aty.Gen.) | 3 | - | 1 | | 65,000 | 9.12 | 50 |
| IL | Consumer Fraud and Protection Division (Aty.Gen.) | 21 | 22 | 30-1/2 | 9 | 1,000,000 | 9.00 | 1,100 |
| IN | Consumer Protection Division (Aty.Gen.) | 1 | 2 | 1 | | 32,500 | 6.26 | 226 |
| IA | Consumer Protection Division (Aty.Gen.) | 3 | 4 | 4 | | 75,000 | 1.96 | 300 |
| KS | Consumer Protection Division (Aty.Gen.) | 2-1/2 | 2 | 2 | 2 | | | 388 |
| KY | Consumer Protection Division (Aty.Gen.) | 3 | - | 3 | 2 | 107,000 | 3.32 | |
| LA | Department of Justice (Aty.Gen.) Consumer Protection Division (Office of Governor) | | | | | | | |
| ME | Consumer Protection Division (Aty.Gen.) | 2 | 1-1/2 | 1 | | 41,000 | 4.13 | |

Table XIII--continued

| State | Name and Location of Consumer Protection Offices | Staff[a] | | | | Annual or Fiscal Budget | | Approx. No. Complaints Received/mo. |
|---|---|---|---|---|---|---|---|---|
| | | Attorneys | Investigators | Secretaries | Others[b] | Dollar Amount | Cents per capita[c] | |
| MD | Consumer Protection Division (Aty.Gen.) | 2 | 5 | 3 | | $ 155,000 | 3.95 | 600 |
| MA | Consumer Protection Division (Aty.Gen.) | 4 | 9 | 4 | | | | |
| MI | Consumer Protection Division (Aty.Gen.) | 2 | 2 | 6 | | | | 800 |
| MN | Consumer Division (Aty.Gen.) Consumer Services Section (Department of Commerce) | 3 | 1 | 4 | | 80,000 | 2.10 | |
| MS | Consumer Protection Division (Aty.Gen.) | | | | | | | |
| MO | Consumer Protection Division (Aty.Gen.) | 1-1/2 | 2 | 1 | | 90,000 | 1.92 | 300 |
| MT | NO ESTABLISHED AGENCY | | | | | | | |
| NB | Department of Justice (Aty.Gen.) | 1/2 | - | - | | | | |
| NV | Consumer Protection Division (Aty.Gen.) | 2 | 1 | - | | | | 12 |
| NH | Consumer Protection Division (Aty.Gen.) | 2 | 2 | 2 | | 75,000 | 10.16 | 200 |
| NJ | Office of Consumer Protection (Aty.Gen.) | | | | | | | |
| NM | Consumer Protection Division (Aty.Gen.) | 1/2 | 2 | 1 | 1 | 50,000 | 4.92 | 175 |

Table XIII--continued

| State | Name and Location of Consumer Protection Offices | Staff[a] | | | | Annual or Fiscal Budget | | Approx. No. Complaints Received/mo. |
|---|---|---|---|---|---|---|---|---|
| | | Attorneys | Investigators | Secretaries | Others[b] | Dollar Amount | Cents[c] per capita | |
| NY | Bureau of Fraud & Consumer Protection (Aty.Gen.) | 29-1/2 | 16-1/2 | 18 | 2 | $1,004,000 | 5.50 | 3,000 |
| NC | Consumer Protection Division (Aty.Gen.) | 6 | 5 | 8 | | 379,792 | 7.47 | |
| ND | Consumer Protection Division (Aty.Gen.) | 1/2 | 1 | 1/2 | | 30,000 | 4.86 | |
| OH | Consumer Frauds & Crimes Section (Aty.Gen.) | 2 | 3-1/2 | 3 | | 134,037 | 1.26 | |
| OK | Consumer Protection Division (Aty. Gen.) | 1 | 5 | 5 | | 234,000 | 9.14 | 100 |
| OR | Consumer Protection Division (Aty.Gen.)<br>Consumer Protection Division (Dept. of Commerce) | 2 | 5 | 2 | | 100,000 | 4.78 | 200 |
| PA | Division of Consumer Affairs (Aty.Gen.) | 5 | 13 | 12 | 5 | 425,000 | 3.60 | 1,500 |
| RI | Consumer Affairs Section (Aty.Gen.) | | | | | | | |
| SC | Consumer Protection Division (Aty.Gen.) | 1 | 1 | 1 | | 100,000 | 3.86 | 25 |
| SD | Office of Consumer Affairs (Aty.Gen.) | - | 1 | 2 | 1 | 43,558 | 6.55 | 100 |

Table XIII--continued

| State | Name and Location of Consumer Protection Offices | Staff[a] | | | | Annual or Fiscal Budget | | Approx. No. Complaints Received/mo. |
|---|---|---|---|---|---|---|---|---|
| | | Attorneys | Investigators | Secretaries | Others[b] | Dollar Amount | Cents per capita[c] | |
| TN | NO ESTABLISHED AGENCY | | | | | | | |
| TX | Antitrust & Consumer Protection Division (Aty.Gen.) | 8 | 1 | 8 | | $ 150,000 | 1.34 | 250 |
| UT | Consumer Protection Division (Aty.Gen.) | | | | | | | |
| VT | Consumer Protection Bureau (Aty.Gen.) | 1 | 1 | 1 | 1 | 41,000 | 9.23 | 100 |
| VA | Division of Consumer Council (Aty.Gen.) Administrator of Consumer Affairs (Dept. of Agriculture & Commerce) | 3 | 9-1/2 | 6 | 1 | 90,000 | 1.94 | 200 |
| WA | Consumer Protection & Antitrust Division (Aty.Gen.) | 9 | 14 | 10 | | 304,965 | 8.95 | 1,500 |
| WV | Consumer Protection Division (Aty.Gen.) | 1/2 | 1/2 | - | | | | |
| WI | Bureau of Consumer Protection | 7 | 6 | 8 | | 405,000 | 9.17 | 600 |
| WY | NO ESTABLISHED AGENCY | | | | | | | |

Source: This table was compiled primarily from data produced from the direct mail questionnaires, however, some secondary data were obtained from the National Association of Attorneys General, State Programs for Consumer Protection (Raleigh: National Association of Attorneys General, 1972).

in the consumer's behalf without specific legislative programs to support their mission.

Organization of Consumer Protection Agencies

Because many states have patterned initial programs after New York's Bureau of Consumer Fraud and Protection, most state programs are housed in the attorney general's office. In fact, some thirty-six states, as shown in Table XIII, have vested the responsibility of consumer protection solely within the offices of the attorney general. This duty is shared between the office of the attorney general and some other agency in a total of six states. In Alabama and Louisiana, the Attorney General and a special bureau within the Governor's office are both responsible for consumer protection activities. California has created an independent agency to work separately from the Attorney General's Office on the task of consumer protection. The states of Minnesota and Oregon divide this responsibility between their Departments of Commerce and the Office of the Attorney General, while Virginia has dictated essentially the same combination with its Department of Commerce and Agriculture. The state of Florida, which has created a Department of Agriculture and Consumer Services, has attached the added responsibilities to the existing Department of Agriculture. Hawaii vests consumer protection responsibilities within the Office of the

Governor; thus the consumer protection office is an appointed position. The states of Connecticut, Delaware and Georgia have organized agencies which act independently of either the Attorney General or any other established agency within the state.

Staffing of Consumer Protection Agencies

The staffing of these bureaus shows a wide degree of variation. Illinois reported the largest total staff with some 21 attorneys (in full-time equivalents), 22 field investigators, thirty and one-half secretaries, and 9 other employees all of whom act as education specialists, public relations personnel and special program administrators. The state of New York ranked next with twenty-nine and one-half attorneys, sixteen and one-half field investigators, 18 secretaries, and 2 specialists. On the other end of the scale, states such as Nebraska, North Dakota, and West Virginia reported only part-time involvement in legal and investigative work.

Of the 41 state agencies for which data are available, 32 have at least one full-time attorney assigned to their staff. Thirty-six states have at least one investigator available for field work. In terms of total staff, the majority of state agencies (23 or 56 per cent) reported fewer than 10 persons in their employ. Eight states have from 10 to 15 employees in their consumer protection agency; 5 states employ from 15 to 20;

and 5 state agencies have staffs larger than 20 persons.

Funding of Consumer Protection Agencies

If one examines the financial resources allocated to protecting the interests of its consumer, it is obvious that the various state legislative bodies view the importance of consumer protection activities differently, as expressed by their willingness to fund them. Yearly operating budgets range from a low of approximately $30,000 in North Dakota to a high of $1,004,000 in the state of New York. Of the 34 states for which financial data are available, 8 states had budgets of $50,000 to $99,999; some 10 states were in the $100,000 to $200,000 category; while the remaining 8 have over $200,000 allocated for consumer protection purposes. In addition to New York, the state of Illinois shows significant deviation from the pattern as it has allocated $1,000,000 to this effort.

The comparison of actual dollar budgets among states which have provided financial data relative to their protection programs may give a slanted perspective due to differences in population. Examining these budgets on a per capita basis presents a much different picture. North Dakota, which had the smallest reported budget, ranks in the second quartile in terms of per capita expenditure (4.86¢). Indiana, with its seemingly limited

budget of $32,500, likewise ranks in the second quartile of per capita expenditures (6.26¢). The state of Ohio spends less per capita (1.26¢) than does any other state reporting; next comes Texas, spending 1.34 cents per capita on consumer protection efforts. Missouri and Iowa join the previously mentioned states in spending less than 2 cents per capita. In terms of dispersion of per capita expenditures for consumer protection, 5 states allocated less than 2 cents per capita; 9 states allocated between 2.01-4.00¢ per capita; 5 states ranged between 4.01-6.00¢; 6 states allocated between 6.01-8.00¢; another 6 states budgeted between 8.01-10.00¢; a single state fell in the 10.01 and 12.00 range; and Hawaii and Alaska deviated substantially from the rest by designating 34.96 and 31.57¢ per capita respectively.

The percentage range of deviation in budgets on a per capita basis is not quite so dramatic as that found in the comparison of total dollar budgets. State-by-state examination of per capita allowances for consumer protective efforts may be more realistic than simply analyzing total budgets; yet neither measure accounts for the fact that the costs of protecting the second 100,000 citizens will not be proportional to the cost of protecting the first 100,000. Substantial fixed costs are involved and there are varying economies associated with the size and scope of protective efforts.

Claims of monetary recoveries for injured consumers within the various states responding to the questionnaire (even though the information was not solicited) was not tabulated because the basis for such estimates is subject to wide latitude of interpretation. For instance, it was claimed that the defense of the consumer's position in a rate increase hearing for an Alabama public utility saved citizens in this state over $600,000 this past year.[21] Such claims are common among protection agencies in other states. They may serve as good public relations efforts in justifying the bureau's existence; yet they do not appear to be a good measure of their activity.

Complaint Activity

Table XIII does present an activity measure in showing the number of complaints received per month by the reporting agencies. There was great variation in the number of complaints received by those 30 agencies who responded to this question. The Attorney General of Wyoming (this state has no authorized consumer protection bureau) reported receiving 11 complaints; the Nevada Consumer Protection Bureau recorded 12. In total some 8 agencies reported 100 or fewer complaints per month; 7 ranged between 101-250; 7 received between 251-500; 3 had from 501 to 1,000 complaints; and 5 agencies logged over 1,000 complaints per month.

When asked to indicate the most frequent areas of consumer complaints the agencies reported the following:

Table XIV

Areas of Consumer Complaint Most Frequently Cited By Responding Consumer Protection Agencies

| Complaint area | No. Responses[a] |
|---|---|
| Auto repair and warranty problems | 26 |
| Mail order merchandise - delivery problems | 12 |
| Mobile home sales and service | 9 |
| Home construction and improvements | 7 |
| Appliance repair and warranty problems | 6 |
| Pyramid sales schemes | 6 |
| Door-to-door sales | 3 |
| Magazine subscription sales | 3 |
| Trade and correspondence schools | 2 |
| Bait and switch advertising | 1 |
| Health Spas | 1 |

[a]Total exceeds the number responding to questionnaire due to multiple response.

This list of complaint areas depicts a close parallel to that presented by the Council of Better Business Bureaus[22] and the one compiled by the President's Advisor on Consumer Affairs.[23]

## Perceived Problems in State Protection Programs

Program administrators were asked to reveal observed problems which make it difficult to protect the interests of consumers within their states. Replies to this question were somewhat similar to those given on a parallel question on the survey instrument sent to members of the

Alabama legislature. Lack of consumer education was cited by approximately 38 per cent of the respondees. It was impossible to differentiate the exact intent of this reply--whether respondents intended to communicate in their answer years of schooling or knowledge as to their "rights" in the marketplace. Approximately 23 per cent took the "path of least resistance" and failed to respond to this question. Weak or inadequate state legislation was cited as a deterrent to effective protection by approximately 21 per cent of the respondees. Indifferent or lackadaisical consumer attitude was stated to be a contributing factor in 9 per cent of the replies. Lack of manpower to effectively carry out the program constituted 6 per cent of the response, while the remaining portion (3 per cent) of response cited a strong "business-oriented" lobby as a factor which makes it difficult to protect the interests of consumers within their state.

The second part of the above question--"In your opinion, how can these [problems] be overcome?"--produced the expected reply from program administrators in most instances. Multiple replies made the cumulative totals greater than the number of constructive replies; however, approximately 36 per cent of all replies suggested education--informative advertising and publicity--as a means of overcoming these earlier defined "problems." Some 11 per cent proposed a mandatory consumer education curriculum in the public school system as the best remedy.

New or improved consumer legislation received approximately 19 per cent of the replies. More vigorous agency action constituted 11 per cent of the proposed remedies and greater budgetary allocation received 6 per cent of the replies. No response made-up the remainder (22 per cent).

The various program administrators were also asked if they felt their present state legislation in the area of consumer protection was adequate. Of the 34 questionnaires returned by the program directors, 14 (41 per cent) replied in the affirmative to the above; 4 persons (12 per cent) refused to commit themselves; and 16 (47 per cent) felt consumer protection legislation in their home state to be inadequate. It is important to note, however, that 4 of the positive responders suggested legislative improvements upon prompting by a subsequent question. This inquiry--"What legislative improvements do you feel are needed in your state in light of your experience with consumer problems?"--produced some interesting results. Besides those 10 who proffered no suggestion due to the belief that the consumer legislative environment was adequate, 6 respondees (including 2 of the previous non-responders) failed to offer any constructive reply. The responses of those 18 administrators who proffered concrete suggestions to the question stated above are listed in Table XV, on the following page, in order of number of persons favoring specific legislation.

Table XV

Areas of Legislative Improvement Suggested by Responding Consumer Protection Agencies

| Legislative Areas | No. Replies |
|---|---|
| Eliminate the holder-in-due course | 6 |
| Prohibit pyramid sales schemes | 5 |
| Provide for warranty regulation | 4 |
| Allow for punitive damages | 3 |
| Regulate sellers of mobile homes | 3 |
| Permit class action suits | 2 |
| Establishment of small claims court | 2 |
| Require the licensing of auto & TV repair shops | 2 |
| Instruct attorney general to seek restitution | 1 |
| Award attorney fees and court costs to successful plaintiff | 1 |
| Adopt the "little FTC" | 1 |
| Create a cooling-off period on door-to-door sales | 1 |
| Regulate proprietary schools | 1 |

Each of the above suggestions was pointed towards a specific, recognized area of legislative weakness within the particular states in question. Referring back to Table XII, the reader will notice that most of these areas of suggested legislation are already in force in a number of states. The only unique area which has not been discussed in the earlier section of this chapter is that one suggesting the establishment of a small claim court system in which the injured consumer can initiate action in his own behalf without the need and expense of legal council.

The suggestion for a small claims court was likewise mentioned by two respondees in reply to a final question

posed to program administrators--"What, if any, administrative changes would you make if you were restructuring consumer protection agencies in your state?" The majority of respondents (approximately 68 per cent) made no reply to this question. This lack was due either to the fact that they could genuinely proffer no suggestions or that they chose the "path of least resistance" in completing this final question. Three of those replying constructively to the above question felt that branch offices located closer to the consumer problems rather than in the state capitol would improve their protective system. This suggestion perhaps stems from the experiences of some eleven states which have already opened branch offices in areas of high population concentration.[24] Two respondees suggested that duplication of efforts be eliminated; both were in states which divided consumer protection responsibilities between two agencies. Two replies reiterated a common plea for more money to expand the program. One response was directed toward the desire for a central information system, such as suggested by the Federal Trade Commission, one which would process complaints and make the data available to all participating agencies on a state and national level. A final proposal was that the designated protection agency within the state be granted "rule-making"

authority in order to define better the boundaries of false and misleading practices.

In summary, Alabama's legislative environment for consumer protection does not compare favorably with that of the vast majority of other states. With few exceptions, the thirty-seven states which have adopted deceptive trade legislation since 1961, provide more complete and comprehensive legal protection for their consumers than does Alabama. As compared to the type legislation adopted by the majority of the states, Alabama fails to provide (1) a comprehensive deceptive trade practice act with civil remedies; (2) provisions for state initiated restitution for injured consumers; (3) means of obtaining the suspension or forfeiture of a firm's franchise for flagrant consumer abuse; and (4) way or means of dealing with bait and switch advertising. The only type of recent consumer legislation which Alabama has in common with the majority of the states is its provision for a cooling-off period on door-to-door sales. The concluding chapter presents a model code to regulate false and misleading advertising and sales practices, one which should compare favorably with current deceptive trade legislation in other states and which would correct the perceived deficiencies in Alabama's consumer protection legislation.

NOTES

[1]41 Ark. Stat. Ann. 1961-4.

[2]"Developments in the Law-Deceptive Advertising," Harvard Law Review, Vol. LXXX, No. 5 (March, 1967), p. 1122.

[3]"Consumer Protection in Michigan: Current Methods and Some Proposals for Reform," Michigan Law Review, Vol. LXVIII (April, 1970), p. 928.

[4]"Translating Sympathy for Deceived Consumers into Effective Programs for Action," University of Pennsylvania Law Review, Vol. CXIV, No. 395 (1966), p. 426 and Warren G. Magnuson and Jean Caper, The Dark Side of the Marketplace (Englewood Cliffs: Prentice-Hall, Inc., 1968), p. 30.

[5]William A. Lovett, "State Deceptive Trade Practice Legislation," Tulane Law Review, Vol. XLVI, No. 4 (April, 1972), p. 725.

[6]David A. Rice, "Remedies, Enforcement Procedures and the Quality of Consumer Transaction Problems," Boston University Law Review, Vol. XLVIII, No. 4 (Fall, 1968), p. 584.

[7]19 Wash. Rev. Code Ann. 86.010-.920.

[8]121.5 Ill. Ann. Stat. 261(2).

[9]Committee on Suggested State Legislation, Council of State Governments, Unfair Trade Practices and Consumer Law (Lexington: Council of State Governments, 1973), p. 2. The Council of State Governments functions as an independent agency whose primary function is to research legislative trends and advise state legislatures of the alternative legislative approaches to deal with current problems confronting state governments.

[10]Ibid.

[11]325 Minn. Stat. Ann. 78-80.

[12]Committee on Suggested State Legislation, pp. 6-7.

[13]William A. Lovett, "Private Actions for Deceptive Trade Practices," Administrative Law Review, Vol. XXIII (1971), pp. 279-281.

[14]Rice, pp. 579-583.

[15]255D Mass. Laws Ann. 14.

[16]140C Mass. Laws Ann. 8.

[17]141 Minn. Stat. Ann. 3.

[18]255B Mass. Laws Ann. 19A.

[19]325 Minn. Stat. Ann. 79(4).

[20]Office of Consumer Affairs, State Consumer Action Summary '71 (Washington, D. C.: Government Printing Office, 1972), pp. 75-76, 112-113.

[21]Office of Consumer Protection, Consumer Newsletter (Montgomery: State of Alabama, September, 1972), pp. 1-2.

[22]Council of Better Business Bureaus, Facts You Should Know About Your Better Business Bureau (New York: Council of Better Business Bureaus, no date given), p. 2.

[23]President's Committee on Consumer Interests, Highlights of the President's Committee on Consumer Interests' Programs (Washington, D. C.: Government Printing Office, 1971), p. 8.

[24]National Association of Attorneys General, State Programs for Consumer Protection (Raleigh: National Association of Attorneys General, 1971), p. 8.

# CHAPTER VI

## RECOMMENDED LEGISLATIVE ACTION

The preceding chapter presented an overview of the various consumer legislative programs in force in the fifty states of the Union. As can be readily seen in Table XII (page 151) of Chapter V, Alabama does not stand alone in its lack of a comprehensive consumer protection code, but it is among the small minority of states which has not passed a viable and modern bill to protect the interests of its consumers in today's market. It is estimated that approximately 80 per cent of the nation's population is governed by such legislation at the state level.[1] The survey of the members of the Alabama State Legislature presented in Chapter IV revealed that, in general, the majority of lawmakers were concerned about the state of consumer protection in Alabama and most expressed their willingness to support specific pieces of consumer legislation.

The following suggested legislation is designed with the intent of receiving the legislative support which was evidenced in the responses to the questionnaire sent to the state lawmakers. The proposed model code is a

compilation of the various sections of consumer protection acts in force in a number of states. It has been the observation of this writer in reviewing the comprehensive consumer protection bills of the thirty-seven states, that all draw heavily from the Suggested Legislation[2] (found in Appendix C) presented by the Council of State Governments; and several sections pertaining to procedure and policy are exactly the same in many states; such is the case in this model code designed for the State of Alabama.

## Proposed Code to Regulate Unfair Advertising and Sales Practices

### Section 1 - Short Title

This Act shall be known and may be cited as the "Consumer Protection Act," delegating authority and prescribing responsibilities to prohibit illegal, fraudulent, and deceptive practices and to provide appropriate remedy therefrom.

### Section 2 - Definitions as Used in This Act

(1) "Person" means any natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(2) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

(3) "Consumer" means any person who uses, purchases, or leases goods or services.

(4) "Consumer interest" means those acts, practices, or methods that affect the economic welfare of the consumer.

(5) "Consumer transaction" means any transaction involving trade or commerce to a natural person; the subject of which transaction is primarily intended for personal, family, or household use.

(6) "Documentary material" means the original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(7) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgement in respect of any such documentary material or copy thereof.

(8) "Know", "knowingly", "knowledge", and "knew" refer to actual awareness of the falsity or deception or that the act or practice used was such that a reasonably prudent businessman was aware or should have been aware that the act or practice was in violation of this Act.

(9) "Willful violation" occurs when the party committing the violation knew or should have known that his conduct was in violation of the Act.

(10) "Implied warranty of merchantability" means that the consumer goods will pass without objection in the trade under the contract description; are free from defects in materials or workmanship; are fit for the ordinary purposes for which such goods are used; are adequately contained, packaged, and labeled; and conform to the promises or affirmations of fact made on the container or label.

(11) "Implied warranty of fitness" means that when the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods shall be fit for such purpose.

(12) "Express warranty" means a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance.

Section 3 - Unlawful Acts or Practices

False, misleading or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Section 4 - Pyramiding Devices Unlawful

Every person who contrives, prepares, sets up, proposes, or operates any pyramiding device shall be guilty of an unlawful practice. A pyramiding sales device in the context of this section shall mean any scheme for the disposal, distribution, or sale of property or service whereby a participant pays valuable consideration for the chance to receive compensation for introducing one or more additonal persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant introduces a new participant. "Compensation" as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme.

Section 5 - Requirement of Warranty

(1) Unless specifically disclaimed, every sale of consignment of consumer goods in this state by a manufacturer shall be accompanied by an implied warranty that the goods are merchantable.

(2) Every sale or consignment of consumer goods in this state by a manufacturer who has reason to know at the time of the sale or consignment that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods shall be accompanied by an implied warranty.

(3) Every sale or consignment of consumer goods in this state made through a retailer or distributor who has reason to know at the time of sale or consignment that the goods are required for a particular purpose and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods, shall, in lieu of the warranty of the manufacturer under the above section, be accompanied by an implied warranty that the goods are fit for that purpose.

(4) No implied warranty of merchantability and where applicable, no implied warranty of fitness shall be waived except in the case of a sale of consumer goods on an "as is" or "with all faults" basis where the provisions of this chapter affecting "as is" or "with all faults" sales are strictly complied with.

(5) No sale of consumer goods on an "as is" or "with all faults" basis shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous instrument is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language that the goods are being sold on an "as is" or "with all faults" basis and that the entire risk as to the quality and performance of the goods is with the buyer.

(6) Nothing in this chapter shall affect the right of the manufacturer, distributor, or retailer to make express warranties with respect to consumer goods. However, a manufacturer, distributor, or retailer, may not, by such express warranties, limit the application of or modify the implied warranties guaranteed by this Section to the sale of consumer goods.

(7) Every manufacturer of consumer goods which are sold in this state and for which there exists an express warranty shall maintain or cause to be maintained in this state or within close proximity thereof sufficient service and repair facilities to carry out the terms of such warranties.

(a) When such service or repair of the goods is necessary because they do not comply with the applicable warranties, work shall commence within a reasonable time following receipt of the goods by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods must be returned, at the manufacturer's expense, in merchantable condition within thirty (30) days. Delay caused by conditions beyond the control of the manufacturer or his representative shall serve to extend this time period.

(b) Should the manufacturer be unable to make repair or return merchantable goods, he shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to the use by the buyer prior to discovery of the defect.

(8) Refusal or failure of a retailer or other seller to deliver to the customer purchasing any goods or services for which an express warranty and statement of service availability exists, or the refusal to make available, on request, information relating thereto shall be an unlawful practice within the meaning of this Act.

Section 6 - Unlawful Going-Out-Of-Business Advertising

No person, firm, corporation, or association shall misrepresent the fact that they are going out-of-business in order to attract customers to their place of business. The holding or advertising of a liquidation sale, auction sale, bankruptcy sale, or other such sale which represents to the consumer that the firm is going out-of-business when such firm is not discontinuing operations within a period of no more than six months from such date of advertisement or sale shall constitute an unlawful practice within the meaning of this Act.

Section 7 - Bait and Switch Advertising Unlawful

The employment of "bait and switch" advertising shall be an unlawful practice within the meaning of this Act. "Bait and switch" advertising in the context of this section means any attractive but insincere offer to sell a product or service which in truth the seller does not intend or desire to sell, evidenced by refusal to show the good, disparagement of the advertised product, requirement of a tie-in sale, or other undisclosed conditions precedent to the purchase; demonstrating a defective or worn product, or other acts demonstrating an intent not to sell the advertised product or service.

Section 8 - Cancellation of Home Solicitation Sales

The buyer shall have the right to cancel any sales agreement resulting from a home solicitation until midnight of the third business day following his execution of an agreement or offer to purchase. To be effective, the cancellation must be sent by certified mail (return receipt requested) and must be postmarked no later than midnight of the third day following the date of signing the agreement or the receipt in writing of a form designating the name and mailing address of the seller, whichever is later. Within ten (10) days after the home solicitation has been cancelled or an offer to purchase revoked, the seller must tender to the buyer the full amount of any down payment made and return all goods traded in under the contract and any note or other evidence of indebtedness. The buyer, upon reasonable demand, must surrender at his residence to the seller any goods delivered under the contract. The buyer, likewise, has a duty to take reasonable care of the goods in his possession before cancellation and for a reasonable time thereafter.

A home solicitation within the meaning of this Act shall include all offers to sell goods or services given on a door to door basis or by telephone and all offers to sell goods or services made as part of a solicitation plan or program in which a home visitation or telephone solicitation by a salesman or other representatives of the seller plays a major part. A home solicitation sale within the meaning of this section does not mean to include a sale made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale; nor does it include sales which have been initiated by the consumer.

Section 9 - Referral Sales Plans Unlawful

The use or employment of any referral sales technique, plan, arrangement, or any agreement whereby the buyer is induced to purchase goods or services upon the seller's representation or promise that if the buyer will furnish names of other prospective buyers of like or identical goods to the seller, he will contact the named prospective buyers and the buyer will receive a reduction in the purchase price by means of a cash rebate, commission, or credit towards the balance due or any other consideration, constitutes an unlawful practice within the meaning of this act. The unlawful practice of referral selling likewise includes the showcase sales technique whereby the buyer is to receive rebate, commission or credit pursuant to a subsequent purchase of like goods based on examination or observation of goods in the buyer's possession.

Section 10 - Non-Negotiability of Consumer Paper

(1) If any contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, such note, instrument, or evidence of indebtedness shall have printed on the face thereof the words "Consumer Paper," and such note, instrument, or evidence of indebtedness with the words "Consumer Paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code--Commercial Paper.

(2) In the absence of such notice on a note, instrument, or evidence of indebtedness arising out of a consumer credit sale or lease as described in this Section, an assignee of the rights of the seller or lessor is still subject to all claims and defenses of the buyer or lessee against the seller arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. The assignee's liability under this Section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Failure to print the words "Consumer Paper" on such note, instrument, or evidence of indebtedness shall subject the seller or other responsible person to appropriate civil sanctions as provided in this Act.

Section 11 - Interpretation

(1) It is the intent of the legislature that in construing Sections 3,4,5,6,7,8,9 and 10 of this Act, due consideration and weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (a)(1), as from time to time amended; and

(2) The Attorney General may make rules and regulations interpreting the provisions of Sections 3,4,5,6,7,8,9 and 10 of the Act. Such rules and regulations shall not be inconsistent with the rules, regulations, and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (a)(1), as from time to time amended.

(3) Such rule making authority shall follow the policy statements set out in the Policies and Procedures section of the Alabama Code.

Section 12 - Exemptions to This Act

Nothing in this Act shall apply to:

(1) Actions or transactions permitted under laws administered by the state Public Service Commission or other regulatory bodies or officer acting under statutory authority of this state or the United States.

(2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical, radio, or television station in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have

knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement, and did not have a direct financial interest in the sale or distribution of the advertised product or service.

(3) No seller of any product or service who disseminates any advertisement or promotional material from a manufacturer, packer, distributor, or other seller from whom he has purchased the product or service shall be liable for the misleading character of the promoted message unless he refused on the request of the Attorney General or Consumer Protection Officer to provide the name and address of the manufacturer, packer, distributor, or other seller from whom he has purchased the product or service and said seller also agrees to enter into an assurance of voluntary compliance as prescribed by this act from disseminating any such advertisement or promotional material thereafter. This exemption does not in any way limit the right of action any consumer may have under this act.

(4) The provisions of this act shall not apply to, and there are exempt therefrom, all persons as defined in and which are subject to the provisions of Act No. 608 of the 1957 Alabama Legislature approved September 18, 1957 appearing as Title 28, Section 90 (1-14) of the Code of Alabama Recomplied--1958; the purpose of which is to regulate trade practices in the business of insurance.

Section 13 - Duties of Attorney General, Consumer Protection Officer, District Attorneys and County and City Attorneys

(1) It shall be the responsibility of the Attorney General to administer this Act and in the performance of these duties the Attorney General may, upon request, receive the assistance of any Department, Board, or Bureau of State Government. With the assistance of the Office of Consumer Protection, housed in the Governor's Office, the Attorney General shall have the following duties:

(a) To investigate, conduct studies and research, to conduct public or private hearings into commercial and trade practices in the sale, distribution, financing and furnishing of goods and services to or for the use of the consumer.

(b) To suggest means of securing adequate representation of the consumers' interest on and before public boards and commissions.

(c) To advise the Governor and the legislature on matters affecting consumer interests, and to assist in developing executive policies, and to develop, draft and prepare legislative programs to protect the consumer.

(d) To promote consumer education by developing in the citizens of this state an awareness of the types of consumer abuses which are found in the marketplace and an understanding of their rights as consumers.

(e) To receive and investigate complaints from the citizenry persuant to this Act and to initiate corrective action where such is needed and inform the injured consumer as to the availability of private action.

(f) To keep and document complaint and investigative information and make such information available to other interested agencies on the state and Federal level and the public at large. Public disclosure shall not be made of any trade secret or financial information obtained from a person which is of a privileged or confidential nature.

(g) To maintain a record of all rules and regulations issued and voluntary compliances made, and receive and collect all court orders and decrees issued under this Act with all these documents being made available upon request and payment of duplication expense.

(h) To encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion, and sale of consumer goods and services.

(i) To coordinate consumer protection activities within state government and maintain a liaison with Federal and local governmental agencies and private consumer organizations.

(j) To do other such acts which are necessary and incidental to the effective operation of this Act.

(2) It shall be the duty of the district attorneys, county and city attorneys to lend to the Attorney General such assistance as the Attorney General may request in the commencement and prosecution of actions included within this Act. A district attorney, city or county attorney, with prior approval of the Attorney General, may institute and prosecute actions hereunder in the same manner as provided for the Attorney General; provided that if an

action is prosecuted by a district attorney, county or city attorney, he shall make a full and complete report of the final disposition of the matter to the Attorney General.

Section 14 - Restraining Prohibited Acts

(1) Whenever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act, or practice declared by Sections 3,4, 5,6,7,8,9 and 10 of this Act to be unlawful, and that the proceedings would be in the public interest, he may bring action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act, or practice, upon giving of appropriate notice to that person. The notice must state generally the relief sought and be served in accordance with Section 20 of this Act at least five (5) days prior to the hearing of this action. The action may be brought in the circuit courts of general jurisdiction of the county or judicial circuit in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the circuit court of general jurisdiction of the county or judicial circuit in which the State Capitol is located or in such county as may be agreed upon by both parties. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this Act, and such injunctions shall be issued without bond.

(2) It shall be the responsibility of the Attorney General to seek, and the court may make such additional orders or judgments as may be necessary, to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing the fraudulent operator to engage in business in this state, or both.

Section 15 - Forfeiture of Corporate Franchise

Upon petition by the Attorney General, the circuit court of general jurisdiction of a county or judicial district may, at its discretion, order the dissolution, suspension, or forfeiture of franchise of any corporation, partnership, or sole proprietorship which knowingly violates the terms of any injunction issued under Section 14 of this Act. The court may likewise appoint a receiver to equitably disburse the assets of the firm if such is necessary.

Section 16 - Powers of Receiver

When a receiver is appointed by the court pursuant to this Act, he shall have the power to sue for, collect, receive, and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this Act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling; and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Section 17 - Private and Class Actions

(1) Any person who purchases or leases goods or services primarily for personal, family, or household use and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by Section 3,4,5,6,7,8,9 and 10 of this Act, may bring action under rules of civil procedure in the circuit court of general jurisdiction of the county or judicial circuit in which the seller or lessor resides, or has his principal place of business, or is doing business, to recover actual damages or $200, whichever is greater. If the court finds that the unfair or deceptive method, act, or practice was knowingly used, it may award three times the actual damages sustained up to a maximum of $2,000.00 in punitive penalties.

(2) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and court costs. Upon finding by the court that an action under this Section was groundless and brought in bad faith or for the purposes of harassment, the court may award to the defendant reasonable attorney's fees and court costs.

(3) Persons entitled to bring an action under subsection (1) of this Section may, if the unlawful method, act, or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (1) of this Section. In any action brought under this Section, the court may at its discretion order, in addition to damages, injunctive or other equitable relief.

(4) Upon commencement of any action brought under subsection (1) of this Section the clerk of the court shall mail a copy of the complaint and other initial pleading to the Attorney General and Consumer Protection Officer and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General and Consumer Protection Officer.

(5) Any permanent injunction, judgment, or order of the court made under Section 14 of this Act shall be prima facie evidence, in an action brought under this Section, that the respondent used or employed a method, act, or practice declared unlawful by Section 3,4,5,6,7, 8,9 or 10 of this Act or by rule or regulation promulgated pursuant thereto; provided, however, that this subsection shall not apply to consent orders or voluntary assurances of compliance.

(6) If any person is enjoined from the use of any method, act, or practice or enters into a voluntary compliance agreement accepted by the Attorney General under the provisions of this Act, such person shall have the right to enjoin competing businesses engaged in like practices.

(7) The action provided by this Section shall be prescribed by one year running from the time of the transaction or practice which gave rise to this right of action, except for the provisions affecting the warranty of goods. Right to action in warranty matters shall extend to the life of such goods.

Section 18 - Assurances of Voluntary Compliance

In the administration of this Act, the Attorney General may accept an assurance of voluntary compliance with respect to any method, act, or practice deemed to be violative of the Act from any person who has engaged or was about to engage in such method, act, or practice. Any such assurance shall be in writing and be filed with and subject to approval of the circuit court in which the

alleged violator resides, or has his principal place of business, or the circuit court of general jurisdiction of the county or judicial circuit in which the State Capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the Attorney General for further proceedings in the public interests, pursuant to Section 14.

Section 19 - Investigative Demands

(1) When the Attorney General has probable cause to believe that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the non-privileged relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce non-privileged relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale, or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(2) At any time before the return data specified in an investigative demand, or within twenty days after the demand has been served, whichever is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the circuit court of general jurisdiction of the county or judicial circuit where the person is served with the demand resides, or has his principal place of business, or in the circuit court of general jurisdiction of the county or judicial circuit where the State Capitol is located.

(3) If no extension or modification of the investigative demand is secured and the written request by the Attorney General is not complied with by the return date thereof, the Attorney General may apply to the court for an order compelling compliance with the demand under this Section.

Section 20 - Subpoenas, Hearings, Rules and Regulations

To accomplish the objectives and carry out the duties prescribed by this Act, the Attorney General, in addition to other powers conferred upon him by this Act, may issue

subpoenas to any person, administer an oath of affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law; provided that none of the powers conferred by this Act shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to penalty or forfeiture; and provided further that information obtained pursuant to the powers conferred by this Act shall not be made public or disclosed by the Attorney General or his employees beyond the extent necessary for law enforcement purposes in the public interest.

Section 21 - Service of Notice, Demand or Subpoena

Service of any notice, demand, or subpoena under this Act shall be made personally within this state, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(1) Personal service thereof without this state: or

(2) The mailing thereof by registered or certified mail to the last known place of business, residence, or abode within or without this state of such person for whom the same is intended; or

(3) As to any person other than a natural person, in the manner provided in the rules of civil procedure as if a complaint or other pleading which institutes a civil proceeding has been filed; or

(4) Such service as a circuit court of general jurisdiction of the county of judicial circuit may direct in lieu of personal service within this state.

Section 22 - Enforcement of Investigative Demands

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the Attorney General, the Attorney General may, after notice, apply to a circuit court of general jurisdiction of the county or judicial circuit and, after hearing thereon, request an order:

(1) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(2) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of

this state, or revoking or suspending the certificate of authority to do business in this state of a foreign corporation, or revoking or suspending any other license, permits, or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(3) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.

Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof.

Section 23 - Civil Penalties

(1) In addition to remedies for contempt of court otherwise provided by law, any person who violates the terms of an injunction issued under Section 14 of this Act shall forfeit and pay to the state a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this Section, the circuit court of general jurisdiction of a county or judicial circuit issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for recovery of civil penalties.

(2) In any action brought under Section 14, of this Act, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 3,4,5,6,7,8,9 or 10 of this Act, the Attorney General, upon petition to the court, may recover, on behalf of the State, a civil penalty not exceeding two thousand dollars ($2,000.00) per violation.

(3) All fines or forfeitures collected under this Act shall be remitted by the court of jurisdiction to the State Treasurer and shall be credited to the account of the Attorney General for the administration of this Act.

Section 24 - Severability

If any provision or item of this Act, or the application thereof, is held invalid, such invalidity shall not affect other provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 25 - Repeal of Conflicting Laws

All laws or parts of laws in conflict herewith are hereby repealed.

## Origin and Discussion of Model Code Sections

This model code is patterned after the Suggested Legislation proposed by the Council of State Governments. As mentioned in the beginning of this chapter this has been the experience of most other states. Although many of the sections found within this model code can be found in the consumer protection legislation of other states, the combination of sections which make up this model code for Alabama is unique--no other state has such a code on its books.

## Title and Definitional Sections

The first two Sections of the Proposed Code follow the pattern set in most statutes dealing with this topic. Section 1 simply sets the title of the bill, while Section 2 defines those terms utilized in the wording of this proposed code which are likely to cause misunderstanding and need to be clarified for purposes of possible future judicial interpretation of the intent of the lawmakers at the time of passage of such legislation. Subsections (1), (2), (3) and (7) of Section 2 are modeled directly after the Suggested Legislation whereas the other definitions are included to clarify specific sections and terms included elsewhere in this model code.

## Unfair Trade Practice Section

Section 3 which states--"False, misleading, or deceptive acts or practices in the conduct of any trade

or commerce are hereby declared unlawful"--broadly sets the scope of unlawful practices prohibited by this act. It follows Alternative 2 of the Suggested Legislation as modeled after the Federal Trade Commission Act. This type statement generally outlines unfair acts or practices and has been adopted by a total of eleven states (as shown in Table XII, page 151). It enjoins virtually all types of deceptive trade practices, and as in the words of Robert Pitofsky, the first director of the Federal Trade Commission's Bureau of Consumer Protection

> . . . if it [Section 5 of the FTC Act] were any vaguer it would probably be unconstitutional. It cuts across the whole area of industrial and marketing practices. Furthermore, courts have been extraordinarily generous with the Commission in terms of interpretation of the statute. We have the capacity in this agency to review virtually every consumer problem that is going to come up.[3]

Alternative number 2 of the Suggested Legislation was selected over Alternative 1, which is in effect in a total of nine states, because of the fact that Alabama appears to have sufficient legislation to control monopolistic and anticompetitive practices[4] thus, there is little need for duplication. The construct and interpretations of unfair or deceptive acts or practices are exactly the same in those twenty states which utilize some version of Alternative 1 or 2.

In choosing between the "FTC approach" to regulating deceptive practices and Alternative 3 of the Suggested

Legislation (in effect in some eighteen states), it was felt that the broader, less descriptive approach to defining unfair or deceptive acts would be best for the State of Alabama because it allows the flexibility to cope with novel practices and variations on old practices which unscrupulous vendors are apt to devise[5] and, in effect, encompasses all those practices which have been declared violative of the intent of the Federal Trade Commission Act. It is generally conceded that Alternative 3 is narrower in scope and application than the other two alternatives;[6] however, it is recognized that the "catchall phrase" as used in most states enacting this alternative does extend the perspective of this act beyond those practices specifically prohibited.

To further support the selection of the "FTC approach" over Alternative 3 of the Suggested Legislation a recent study on the effectiveness of Florida's consumer protection program conducted by the Governor's office recommended that in order to strengthen the state's consumer protection code "Parts III and IV of Chapter 817 [Alternative 3 of the Suggested Legislation] be replaced by a "baby FTC" act such as contained in section 5(a)(1) of the Federal Trade Commission Act."[7] Although information is not available to support the contention, it is suspected that this same type of thought produced the enactment of both Alternatives 2 and 3 of the Suggested Legislation in Minnesota.

Other Prohibitory Sections

The contents of Sections 4,5,6,7,8,9 and 10 may well be included under the general prohibition of Section 3 of the model code but are specifically written into this Act to clarify the intent of this legislation. Data in Chart III in Chapter IV (page 128) depict a positive attitude toward the first four of the above mentioned Sections dealing with pyramid sales, warranty regulation, going out-of-business and bait and switch advertising as expressed by the "legislative majority." In addition the Federal Trade Commission's interpretations of the unlawfulness of these practices is not altogether clear, thus their specific inclusion in this act. The same applies to the cooling-off and referral sales provisions. Although the Federal Trade Commission is focusing some attention on these two practices and both are policed under the new "Mini Code" in Alabama, they were included in this model act to expressly prohibit these practices in this code and thereby avail to persons injured by these unlawful acts access to the remedies proscribed in this Act.

The Section pertaining to pyramid distributorships (Section 4) is modeled directly after the act prohibiting such sales schemes in Arkansas[8] and elsewhere. This approach generally prohibits the operation or use of multi-level distributorships and was favored over the laws regulating this type practice in Maryland[9] and

Massachusetts.[10] These two states permit pyramid sales schemes to operate yet expressly provide for cancellation of the contract for any reason by the participant and the repurchase of all unencumbered products in saleable condition.

With only slight modification, the warranty provision (Section 5) was taken directly from the California Civil Code because of its stringent approach to correcting problems associated with warranted goods. The modification involves subsection (7) which refers to the requirement that the manufacturer "maintain or cause to be maintained . . . sufficient service and repair facilities." The California law designates that these sufficient service and repair facilities be maintained within the state; the model code allows them to be within close proximity rather than solely within state boundaries. This phrase was added in the attempt to minimize the possible harsh requirement that a manufacturer establish or provide for the establishment of service and repair facilities in every state in which his goods are marketed.

Section 5 of the model code places rather stringent responsibilities upon both manufacturer and vendors of consumer goods and is in keeping with the trend toward greater accountability for the merchantability and fitness of consumer goods on the market today. This type law is not popular among many manufacturers and vendors of durable

goods because of the penalties imposed or likely to be imposed upon them for failure to comply with these provisions. In light of this resistance, several states have enacted only the last subsection of this proposed Section which merely requires that the retailer or other seller deliver to the buyer any express warranty and service provisions which the manufacturer includes with his product.

The inclusion of Section 6 (Unlawful Going-Out-of-Business Advertising) and Section 7 (Bait and Switch Advertising Unlawful) follows the approach taken in those numerous states which have taken these two unlawful business practices out of the criminal codes and placed them in the civil law area. The wording of both Sections is modeled after the common terminology found in practically all states regulating these practices. Bait and switch advertising, however, is relatively easy to define but difficult to prove.

The final three prohibitory sections (8,9 and 10), dealing with the cancellation of door-to-door sales, referral sales plans and the holder in due course doctrine, were specifically included in this model code even though they are currently included within the provisions of the "Mini Code" as mentioned in Chapter III, page 78. The present law concerning these practices delegates administrative responsibility for the enforcement

of these three provisions to the State Banking Department. Inclusion of these three areas within the model code would provide broader and more stringent remedies to combat abuses outlined in Sections 8,9 and 10 as well as place administrative responsibility for enforcement in an agency better equipped to deal with problems of consumer abuse. The State Banking Department, as brought out in Chapter IV, page 141, is ill-suited to deal with illegal referral sales plans and fraudulent home solicitations when credit is not involved in the transaction.

Section 10, which eliminates the holder in due course doctrine on all consumer paper, is modeled after the Suggested Legislation and differs from the provisions of the "Mini Code" in specifying that any contract for the sale or lease of consumer goods be included under the provisions of this Section, and it requires that consumer paper be so marked as to differentiate it from other types of negotiable instruments.

In terms of ease of passage of this proposed consumer legislation, it must be recognized that combination of Sections 3,4,5,6,7,8,9 and 10 into a comprehensive code may be detrimental to this goal. The essence of each of these specific Sections could well be presented as separate bills, and perhaps should be presented as separate entities in order to enhance the likelihood of the passage of the total bill. In looking to other states as

a guide, the common approach has been to separate the proposed legislation and let each item pass or fail on its own merit rather than have the entire code affected by the legislators' dislike of one particular Section of the proposed bill. These Sections are combined to form one comprehensive code to eliminate the duplication naturally found in the separation of the above provisions.

Interpretation and Exemption Sections

Section 11 (Interpretation) effectively adopts the interpretations of Section 5(a)(1) of the Federal Trade Commission Act set forth by either the Federal Trade Commission or the federal courts. Parts (1) and (2) are taken directly from the Suggested Legislation and are found in the codes of almost every state which has passed comprehensive consumer legislation recently. Subsection (3) was included by the writer in order that the rule making authority granted to the Attorney General in subsection (2) follow the policy designated in the Policies and Procedures Section of the Code of Alabama.

The exemptions to this Act, outlined in Section 12, likewise follow the common form and terminology found in such legislation. Subsections (1) and (2) are included within the codes of practically all states which have recently enacted comprehensive consumer legislation. Section (3) is modeled directly after the Louisiana Consumer Protection Law and extends to the seller of consumer goods the same type protection as afforded the

publisher, broadcaster, etc. . . . under subsection (2) when he simply reproduces or has reproduced a prepared ad sent to him by a manufacturer or supplier. Both the media and seller exemption (when they meet the test of requirement) can be justified because of the lack of expertise or facilities needed to determine the truth or falsity of advertisements presented to them for all goods they handle. Subsection (4), exempting insurance companies from the provisions of the model code follows the pattern of the State of Texas. Alabama's insurance code is quite comprehensive and the Department of Insurance appears to be well equipped to deal with false and misleading advertising and sales practices.

Administrative Responsibility Section

The duties of the Attorney General, Consumer Protection Officer, district attorneys and county and city attorneys, as set out in Section 13, represent a compilation of those job responsibilities listed in the Suggested Legislation and the numerous state codes researched. It is important to note that the primary responsibility for consumer protection rests with the Attorney General. The Governor's Office of Consumer Protection is officially recognized in the proposed code but is placed in a position inferior to the Attorney General's Office. If the Governor's Office of Consumer Protection were not already in existence and

its presence recognized by the public, this agency would not be given any responsibilities within this proposed act because of the potential for conflict in the administration of this act and the likely confusion on the part of the consumer as to which agency has authority and jurisdiction to aid him. It is generally recognized that one statewide organization is preferable to a number of agencies in the administration of consumer protection laws,[12] yet, as the Office of Consumer Protection has both public visibility and political support, it appears best to include it within the confines of this proposed act rather than ignore it and face possible reprisal on this point in the passage of the proposed legislation.

The Attorney General is the favored administrator of this program rather than the Office of Consumer Protection, Department of Agriculture, or other agencies within this state because of the legal expertise housed in the Office of the Attorney General and the greater likelihood of a more aggressive and vigorous prosecution policy.[13] One must also recognize that the prestige and power associated with the Attorney General's Office may well curb the actions of potential violators as well as bring some violators under control by the mere mention of the fact that the Attorney General's Office is investigating their activities. Critics of housing consumer protection activities in the Attorney General's

Office are quick to point out that this office has many other potent responsibilities and may not give consumer protection the attention it deserves,[14] yet if adequate funding were available and the responsibility for this activity were delegated to a separate department or bureau, this criticism would not be valid. Indeed, it would be senseless to expand the responsibilities of any agency without commensurate increases in power and resources.[15]

Proponents of placing the responsibility for consumer protection in the Department of Agriculture can logically explain its presence as an extension of the Department's other protection activities (weights and measures and pure food laws) but they must also recognize the other diverse functions this department performs. "Its primary emphasis, traditions and habits of thought are likely to be the protection of producer interests, such as farmers, farm co-ops and food processors, rather than up-to-date representation of urbanized consumer interests. Therefore a greater danger exists that consumer protection enforcement authority placed in a department of agriculture will be much less vigorously and effectively administered.[16] The Office of Consumer Protection can also be discounted as the primary administrator agency because of its recognized lack of legal expertise.[17]

As pointed out in the definition of duties and responsibilities of persons under this proposed act, the Attorney General is not the sole enforcement agency. The various district attorneys and county and city attorneys are responsible for prosecution of local operators whose actions may be overlooked or bypassed by the state-wide protection agency. The wording of Subsection (1)--"With the assistance of the Office of Consumer Protection"--should likewise involve the Governor's Officer in the task of consumer protection yet provide the Attorney General the possibility of designating certain of these listed tasks to the Office of Consumer Protection.

Administrative Remedy Sections

Section 14(1) provides the Attorney General with the authority to seek injunctive relief in the public interest against firms suspected of using, which have used, or are about to utilize any unlawful practice outlined in the proposed code. The wording of this subsection follows the form set forth in practically all states granting injunctive relief to their public in the area of consumer transaction problems. Injunctive relief is common to all states which have recently passed anti-deceptive trade practice acts and represents a starting point in providing civil remedies to combat fraudulent business practices. The issuance of an injunction or restraining order by the court bars the

continuance of specified practices listed in the complaint, and violation of the court order makes the defendant liable to the court sanctions specified in Section 23 of this proposed code. With the possibility of a substantial civil fine, this type action has been found by most states to be an effective curb against responsible businessmen continuing the unlawful practice(s) but it is often found to be ineffective against the unscrupulous entrepreneurs.[18]

Restitution is provided for as an available administrative remedy in Section 14(2). As pointed out in the previous chapter, this administrative right to action is available in some twenty-six states. The wording of this subsection departs from the common approach in that it specifically charges the Attorney General to seek restitution as well as grant to the courts authority to restore the injured consumer to his previous state. It is important to note here that reparation can be obtained for the injured consumer without the need for him to take the initiative of going to court to seek redress or the necessity to retain legal representation.

Section 14(2) also provides for the possibility of the court's revoking or suspending a firm's license for the conduct of unlawful practice and provides for the appointment of a receiver, if the need arises, for the purpose of making restitution. The powers of such a receiver are outlined in Section 16 of this proposed code.

This Section follows the standard form as presented in the Suggested Legislation and adopted by those eight states listed in the previous chapter. The earlier Section (15) is likewise addressed to the most flagrant violators of this Act in that it provides for the possibility of the Attorney General seeking suspension or forfeiture of a company's franchise and for the court ordering dissolution of the firm if the aspects of the case warrant. The wording of this last section generally follows that presented in the Suggested Legislation.

Private and Class Action Section

Section 17 describes an individual's right to bring action against firms for violation of the provisions of this proposed code. While it is recognized that individual relief may be obtained through administrative action for restitution as provided for in Section 14, private rights to action assure individuals that their cause can be heard even if administrative action is not taken. With private remedies available, the defrauded consumer is not forced to rely solely upon governmental action in order to obtain relief. Private right to action is often viewed as an effective complement to administrative actions, taking up the slack in protection activities caused by modest financing of governmental agencies assigned to this task.[19] It permits individuals to attack unfair business practices

which may escape the attention of the Attorney General or other enforcement agencies due to lack of resources, concern, or magnitude of the offense. The provisions of Section 17(1) tend to be rather stringent as compared to other states providing for private actions. It follows the Suggested Legislation in awarding two hundred dollars or actual damages, whichever is greater, upon proof of injury. Treble damages up to a maximum of $2,000.00 in punitive penalties may be awarded by the courts in instances where firms knowingly utilize an unfair or deceptive act as outlined in the earlier Sections. This punitive section serves the function of offsetting the risks of litigation and is included to overcome inertia in the realm of private actions.[20] The inclusion of the treble damages provision is often cited as a possible source of temptation for unwarranted claims and harrassment type suits[21] but its deterrent as well as admonishment effect is felt to offset the recognized drawback. One must also recognize that treble damages may be awarded only after "knowledge" within the meaning of the definitions Section of this Act has been proven. A maximum penalty of $2,000.00 was included by this writer to curtail, somewhat, the aforementioned inherent weakness in the treble damages provision.

In addition to the possibility of punitive damages, Section 17(2) provides for the award of reasonable attorneys' fees and court costs to the successful plaintiff.

"Knowledge" or "intent to injure" need not be proven before such awards are granted; the plaintiff must simply win the decision in order to receive this benefit. The incentive factor of this provision is apparent. With this type provision both the attorney and the plaintiff are more willing to initiate private action. The $200 minimum payment provided for in Section 17(1) is thought by some to be sufficient to cover the costs incurred in initiating private suit, yet it is estimated that the prospect of $200 in damages is not enough to make an action worthwhile in view of the risks and costs associated with such action.[22] For this reason, court costs and reasonable attorney's fees are provided for in this Section. To offset the likelihood of harassment suits, subsection (2) likewise provides that attorney's fees and court costs be awarded to the defendant upon finding by the court that an action under this Section was unwarranted or brought in bad faith for the purpose of harassment.

Section 17(3) is perhaps the most controversial point in this entire model code. It explicity provides for class action suits as one means of remedying consumer transaction problems. Many businessmen fear the class action because of the potential for damages which could conceivably be imposed upon them by the courts. Unscrupulous vendors selling "small ticket" items particularly dislike this type action because it makes small claims worthwhile to pursue en masse.

The states, rather than the Federal government,[23] have provided leadership in the area of class actions even though the Federal Trade Commission has long argued its benefits.[24] The plaintiff's advantages of class actions can be grouped into three categories: psychological, procedural, and economic.[25] The psychological advantage centers around the fact that class action suits tend to communicate the idea of a "public wrong" rather than an individual injury. Notoriety focused on this type "public injury" helps to educate consumers to their rights as well as cast an accusing finger at the firm found in violation of the law. The procedural advantages gained by class action are two-fold: (1) it widens the scope of admissable evidence, and (2) offers protection from dismissal on the grounds of mootness. Although an indirect procedural advantage to the consumer, the class action provision likewise cuts down on the caseload of the courts by handling many potential suits as one, thus freeing the court and the judge to perform other duties.

The economic advantages are apparent. Besides reducing caseloads and court costs, there are obvious gains to an attorney representing consumers as a class rather than initiating individual actions. Class actions are particularly appropriate for combatting "small ticket" deceptive trade practices. With the remedies described in

subsection (1) and (2) of this Section, individual consumer actions are not economically effective for small claims. Private actions would cumulatively represent considerable waste and duplication of efforts. Class action, where there is a commonality of injury, appears to be the best remedy for the "nickel and dime" type of deceptive trade practice. Private rights to action are perhaps better directed toward situations where substantial dollar amounts are involved and a specific detail of the extent of an individual injury can be obtained.[26]

Class actions are limited in that they must meet the requirements of (1) a common injury and (2) fairly represent the interest of the group. The biggest test is that all the members of the class were subject to the same type deceptive practice. In those instances where personal selling is involved and the individual salesmen varied their presentations to suit particular customers this commonality requirement will be difficult to meet. Class actions are particularly adept in combatting deceptive practices associated with the sale of inexpensive convenience items which traditionally utilize advertising as their primary promotional tool.

The class action suit does increase the number of plaintiffs who initiate action against a named defendant. In this sense, the businessman's fear of a higher payout to plaintiffs for unfair practices may be well founded: but

who benefits most? In conjunction with the treble damages provision and the award of court costs and reasonable attorney's fees, class action serves to enhance the bargaining power of the consumer as he seeks satisfaction in his transaction problems.

Subsections (4) and (5) are taken directly from the Suggested Legislation of the Council of State Governments. Subsection (4) sets the duty of the clerk of the court to inform the Attorney General and Consumer Protection Officer the pleadings and decision of the court relative to violations of this act. Subsection (5) distinguishes between the admissability of evidence of a court ordered injunction and voluntary compliance. Subsections (6) and (7) are borrowed from the Louisiana Consumer Protection Law.[27] The first of these provisions is included in this model code to encourage firms cited for utilizing certain deceptive acts or practices to enjoin their competitors using the same practices. This may have the effect of reducing the workload of the protective agency. Section 17(7) establishes a statute of limitation of one year from the time of transaction or illegal practice in which to initiate private or class action. This provision has the effect of encouraging quick remedial action to correct the consumer abuse in the marketplace. A limitation of one year should not impair the right to action for most consumers as they should be aware of the unfair or

deceptive nature of the transaction within this period of time. Warranty provisions (not included in the Louisiana Code) are excluded from the one year requirement for obvious reasons.

Procedural Sections

Section 18 establishes voluntary compliances and consent orders as an avenue of administrative action. This type solution has long been used by the Federal Trade Commission as a means of correcting problems in the marketplace and is found in all states which provide for administrative action under their comprehensive consumer protection act. It is generally effective in dealing with those honest businesses who essentially desire to comply with the law.[28] It allows for a relatively quick and inexpensive remedy to specific problems of consumer abuse; yet as brought out in the American Bar Association study of the Federal Trade Commission,[29] the compliance procedure may supplant effective enforcement if utilized too frequently and without thorough screening and investigation. Voluntary compliance does allow the legitimate businessman a means of avoiding costly and time consuming litigation and the agreement itself precludes continuance of the described practice. Entering into a voluntary compliance agreement with the Attorney General does not alleviate the possibility of private action; but, as per Section 16(5), this agreement cannot be used as evidence in individual actions against the named defendant.

Sections 19, 20, 21, and 22 are taken directly from the Suggested Legislation as adopted by practically all states enacting comprehensive consumer legislation. Section 19 grants the Attorney General power to initiate broad investigations relating to deceptive practices outlined in this act along with the authority to request documentary materials and require the testimony of knowledgeable persons. It is important to note that this investigative power is not limited to judicial proceedings[30] and may be utilized in the performance of the other tasks set out in Section 13 of this model legislation.

Section 20 expands upon the powers granted to the Attorney General. Besides the power of subpoena and the authority to call for hearings and investigations, the Attorney General is explicitly given rule making authority. This allows a businessman to seek the advisement of the Attorney General as to the legality of a proposed practice. The Attorney General can also establish regulations to interpret the intent of this model legislation. A compilation of such rules and regulations, which is a duty assigned to the Attorney General, will give the business environment some guidelines of fair conduct.[31] Sections 21 and 22 simply establish the procedure for the service of a subpoena or other demand and list the possible penalties the Attorney General may seek against persons failing to comply with such requests.

Civil Penalty Section

The civil penalties section (Section 23), like the private and class action section in this proposed code, establishes the possibility of stringent penalties to be levied against firms found to be in violation of this code. As with the Suggested Legislation, violation of an injunction carries a maximum penalty of $25,000.00 with the funds being applied to the operations of the protection agency. As contrasted with the penalties invoked for violation of injunctions issued in many other states, this greatly exceeds the mode of $10,000.00 (see Table XII). A maximum fine of $25,000.00 is found in only three states at present. Such a large penalty creates the possibility of a strong punitive approach to consumer protection at the administrative level and should be an effective tool in restraining subsequent use of a practice once an injunction is issued against a specified firm.

In line with the rather severe penalty for violation of an injunction, a firm proven guilty of willfully violating the provisions of this act is subject to a penalty of not more than $2,000.00 per violation. Having both types of civil penalties available, the Attorney General has a choice of corrective action to fit the needs of the situation. In the absence of a voluntary agreement, the Attorney General may seek an injunction to bar further

action and is backed-up by the rather severe penalty outlined above; or he may directly seek punitive damages for flagrant, willful violation of this act in conjunction with a restraining order barring further action of this sort.*

Concluding Sections

The concluding sections (24 and 25) represent the standard form in the design of any multifaceted legislation. Section 24 provides for the severability of any section in the proposed code found to be invalid or unconstitutional. This provision allows for the continuance of the other sections or subsections of the Act even if one is thrown out by the courts. Section 25 simply repeals any law or part thereof which conflicts with the proposed code.

Passage of Proposed Code

At the outset it was the stated objective of this research to design an effective code to regulate unfair advertising and sales practices which would pass the Alabama Legislature. As mentioned earlier in this discussion, it would be better tactically to submit this code as several pieces of legislation rather than one. This tactic might enhance the likelihood of passage of the major points of the bill as it lessens the possibility of its failure over a single issue.

*This second approach may be taken in lieu of an action for dissolution of corporate charter or the forfeiture of the company's right to do business within the state as provided for in Section 15 and 22.

This proposed code is rather long and detailed, covering many procedural areas; however, on the basis of the replies given by members of the state legislature, there exists adequate support for its passage. Taking the most pessimistic point of view and referring to the "legislative majority" as discussed in Chapter IV, there are four points in this proposed code which need to be effectively publicized for the passage of this bill as presented. Data in Chart III (page 128) depict those areas of ambivalent legislative response as described by the median profile (assuming non-respondees would have answered in the negative area of response)--the holder in due course, class action suits, awarding payment of attorney fees in private suits and adoption of the "little FTC Act." It is assumed that with effective education and publicity as to the intended effect of each of these provisions those legislators who gave a zero or ambivalent replies to their support of these legislative areas could be swayed to vote positively for such provisions. Looking at the legislators' replies from a different prospective it can be seen that only 17.6 per cent of those replying to the questionnaire were not in favor (i.e., answered -1 or lower) of eliminating the holder-in-due-course doctrine; 21.0 per cent replied negatively to the creation of class action suits; the same percentage answered in the negative area

to the award of attorney fees; and only 13.5 per cent of those replying would not support "little FTC" type legislation. From either point of view, a clear potential exists for obtaining adequate legislative support for the passage of this proposed legislation in its general form.

## Suggested Method of Implementation

Assuming that the proposed code is passed by the legislature there are several major areas of consideration which must be acted upon. First is the organization of consumer protection activities. As the proposed code designates primary responsibility for program administration to the Attorney General, it seems logical that this office must be enlarged to take on the added responsibilities. Merely increasing the size of the staff will not be in the program's best interests. If adequate attention is to be given to the area of consumer protection a separate department needs to be created and assigned this responsibility. Unless the responsibilities are divided along departmental lines, consumer protection activities may be quickly subjugated to problems of more eminent importance. This conclusion is supported by the experience of other states. Following the pattern of some thirty-seven other states, the creation of a separate consumer protection division within the Attorney General's Office with its own staff and budget would establish

accountability for the program and help set the priority of consumer protection vis-a-vis other activities performed by this office.

Staffing and Funding Consumer Protection Bureau

The exact size of the staff and funding needed to perform the assigned tasks cannot be ascertained by this study. The experience of other states may be helpful in establishing some estimates however. An examination of the resources allocated to consumer protection (found in Table XIII, page 173) by states of comparable size and population suggests a starting point. At least two qualified attorneys need to be assigned full time to the task of consumer protection. They should be assisted by a like number of field investigators and at least two secretaries for record keeping and communications.

Adequate funding presents another question. As is true in other states, it is expected that after a period of time the Department would generate some revenues to be paid in to the state treasury through fines and penalty assessments. It is also recognized that the start-up cost--initial expenditures for recruitment, equipment, fixtures and supplies--may be rather substantial. In approximating how much to allocate for this function, the experience of other states may again be helpful. Table XIII, found on page 173 in Chapter V, presented data relative to the amount other states have allocated to the

task of consumer protection. In terms of per capita expenditures of those states reporting, a mean of 6.80 cents was computed. Relating this to Alabama's population[32] produces a budget of approximately $234,250. This mean value has an upward bias due to the two extreme values (Alaska and Hawaii) and perhaps, the median value of those replying to the second questionnaire would be more realistic. This median value (4.89 cents), converted into a population based figure, produces a budget of approximately $168,500. Comparing this amount to the total dollar budgets in the other states reporting shows only nine states exceeding this figure. In terms of this type comparison, the members of the Alabama Legislature might well consider this amount to be too substantial. It is, therefore, suggested that a range somewhere between the twenty-fifth and fiftieth percentile of per capita expenditures be considered. This would produce a suggested budget, based on Alabama's population, which would fall somewhere between $86,500 and $168,000.

Administrative Responsibility

The Department within the Attorney General's Office which is to be created for this task must work closely with the Governor's appointed Consumer Protection Officer. As explained in the discussion of Section 13 of the model code, this officer and his staff is to assist the Attorney

General in the performance of the designated tasks.* It is suggested that the Governor's Office of Consumer Protection focus its attention upon certain of the specified responsibilities listed under Section 13(1) of the proposed code. Specifically, the Office of Consumer Protection could be of most assistance to the Attorney General by attempting

- To promote consumer education by developing in the citizens of this state an awareness of the types of consumer abuses which are found in the marketplace and an understanding of their rights as consumers.
- To encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion, and sale of consumer goods and services.

Pursuant to the above tasks, the Governor's Office of Consumer Protection needs to assist in the collection and documentation of data relative to consumer protection efforts within this state and should advise the Attorney General in matters pertaining to consumer interests. The Office of Consumer Protection should not attempt to attract and/or investigate consumer complaints; this task is best left to the agency with the authority and expertise to effectively perform this function.

*It is again called to the reader's attention that it is preferable not to divide the responsibilities for consumer protection among different agencies, however, it is felt that the elimination of the Office of Consumer Protection will meet with legislative opposition, thus its inclusion in the proposed code and suggested program for implementation.

Consumer Education

In relation to the task of consumer education, some concern must be given to the fact that a substantial portion of Alabama's population is rurally located--41.6 per cent as compared to a national average of 26.5 per cent.[33] As one might imagine the majority of this rural population is poor, black and, as pointed out in Chapter IV, lacks formal education relative to the urban, white population. This is not to say that rural blacks are the ones who suffer most from deceptive practices. It has been proven that urban residents of moderate or high incomes lose as much or more in actual dollars since their volume and range of purchases is larger.[34] The point to be made here is that the rural resident (black or white) may be much more difficult to reach and may require an entirely different form and mode of communication to affect his awareness of consumer problems and the means of avoiding or remedying them. The conventional approach to consumer education--public relations efforts and action lines in the newspaper, public service spots on broadcast media, pamphlets and brochures and the speaking tour--is directed more toward the urban dweller. Reaching and educating the rural resident may require a slightly different approach. Greater emphasis can be focused on the classroom, particularly in the lower grades

of school. A compulsory consumer education course, a possibility mentioned by members of the state legislature, needs to be given serious consideration. The district attorney's office and county extension agents found throughout the state could be involved in this education process. The possible use of Farm Bulletin and other such mailings to the rural community likewise needs to be investigated. Educational television has been found to have a strong rural following and steps are already being taken in this area to educate the public of his rights as a consumer in the marketplace.*

Branch Offices

Other states have moved in the direction of branch offices to assist in the task of consumer protection once their bureaus of consumer protection have become well established. The idea behind branch offices is to reduce the distance between the site of consumer injury and available assistance for consumer problems. Wide area telephone service (WATS) systems overcome this distance factor to a degree and should be utilized in the conduct of the program. The Governor's Office of Consumer Protection is currently using such a system

*This writer authored the script for a fifteen minute program on consumer protection which has already been viewed over the Alabama ETV network.

although it has not given much publicity to the toll free number to avoid being swamped by calls.* It is generally thought preferable, even though more expensive, to locate branches closer to the consumer than to expect him to come (via phone or otherwise) to a centralized place for assistance with his transaction problem.[35] Branch offices should be considered in the future plans in the organization of the Attorney General's Office. Concern should be given to the rural resident in locating these branches, however.

Suggestions for Further Study

Further research is suggested in determining the number of branches needed and their location to best serve the interest of consumers. At present little specific information is available on the frequency, type and location of consumer abuses occuring within this state. Adequate record keeping of complaints should shed some light on this problem once the proposed system is ongoing. Some testing of consumer knowledge relative to his rights as a consumer in the marketplace should likewise be of aid in implementing an effective education program. Further study in media and message content should also prove beneficial.

*Anita Hogg, Office of Consumer Protection, Montgomery, Alabama, personal interview, October 27, 1972.

NOTES

[1]William A. Lovett, "State Deceptive Trade Practice Legislation," Tulane Law Review, Vol. XLVI, No. 4 (April, 1972), p. 724.

[2]Council of State Governments, Committee on Suggested Legislation, Unfair Trade Practices and Consumer Law - 1973 (Lexington: Council of State Governments, 1973).

[3]"FTC Consumer Chief Pitofsky Cites FTCA Flexibility, Need for Consumer Class Suits," ATRR News, No. 545 (January 1, 1972), p. A-6.

[4]7 Ala. Code 124; 57 Ala. Code 106-108.

[5]"FTC Urges States to Enact Unfair Trade Practices and Consumer Protection Law," News Release: Federal Trade Commission (August 13, 1969), p. 2.

[6]Ibid.; Ronald I. Cohen, "Comparative False Advertising Legislation: A Beginning," The Adelaide Law Review, Vol. 4, No. 69 (1971), p. 75; Council of State Governments, Committee on Suggested State Legislation, Unfair Trade Practices and Consumer Law - 1973 (Lexington: Council of State Governments, 1973), p. 2; Lovett, p. 733.

[7]Arthur J. England, Jr., Consumer Affairs in Florida: A Report to Governor Ruben O'D. Askew (Tallahassee: State of Florida, 1973), p. 313.

[8]Arkansas Consumer Protection Act, No. 26 (February 15, 1971).

[9]661 Md. Ann. Code 1.

[10]93 Mass. Laws Ann. 69.

[11]1970 Cal. Civ. Code 4(3C).

[12]Lovett, pp. 734-736; "Consumer Protection in Michigan: Current Methods and Some Proposals for Reform," Michigan Law Review, Vol. LXVIII, No. 5 (April, 1970), p. 972; David A. Rice, "Remedies, Enforcement, and the Quality of Consumer Transaction Problems," Boston University Law Review, Vol. XLVII, No. 4 (Fall, 1968), pp. 596-604; Michael A. Sand and Joel Weisberg, "Translating Sympathy for Deceived Consumers into Effective Programs for Protection," University of Pennsylvania Law Review, Vol. CXIV, No. 3 (January, 1966), pp. 428-430.

[13]Lovett, p. 735.

[14]Sand and Weisberg, p. 429.

[15]"Consumer Protection in Michigan," p. 971.

[16]Lovett, p. 735.

[17]"Consumer Protection Office Defines its Role," The Birmingham News (February 8, 1973), p. 3.

[18]Lovett, p. 739.

[19]William A. Lovett, "Private Actions for Deceptive Trade Practices," Administrative Law Review, Vol. XXIII (1971), p. 274.

[20]Cohen, pp. 78-79.

[21]Ibid.; Rice, pp. 573-574; "Consumer Protection in Michigan," pp. 982-983; Lovett, p. 745.

[22]Rice, p. 567; Sand and Weisberg, p. 403.

[23]In Snyder v. Harris, 394 U. S. 332 (1969), the Federal Court stated that Rule 23 for class action did not apply to consumer transaction problems.

[24]"FTC Urges . . .," p. 8.

[25]Ronald E. Young, "Federal Rules of Civil Procedure: Rule 23, The Class Action Device and its Utilization," University of Florida Law Review, Vol. XXII (1970), pp. 618-619.

[26]Lovett, "Private Actions . . .," pp. 284-285.

[27]Louisiana Unfair Trade Practices and Consumer Protection Law, Act 759 (July, 1972).

[28]Cohen, p. 79.

[29]American Bar Association, Report of the ABA Commission to Study the Federal Trade Commission, (Chicago: The American Bar Association, 1969), p. 34.

[30]"Consumer Protection in Michigan," p. 974.

[31]Ibid.

[32]1970 Census of Population, General Social and Economic Characteristics--Alabama (Washington, D. C.: Government Printing Office, 1972), p. 2-64.

[33]Ibid., p. 2-166.

[34]Lovett, "State Deceptive Trade Practice Legislation," p. 726.

[35]National Association of Attorneys General, State Programs for Consumer Protection, (Raleigh: National Association of Attorneys General, 1971), p. 8.

# APPENDICIES

# APPENDIX A

# LEGISLATOR QUESTIONNAIRE

Auburn University
Department of Marketing and Transportation
Auburn, Alabama 36830

June 30, 1972

_____
_____
_____
_____

Dear _____:

The area of consumer protection has received a great deal of attention in the news media and elsewhere in the recent past. As you are aware, numerous Federal and state agencies across the country have been created to afford greater protection to the consuming public. Alabama, through your efforts during the last legislative session, has joined other states in attempting to up-date consumer legislation. Some individuals feel that this is a constructive beginning--but only a beginning, while others feel that our consumer legislation is quite adequate. I am currently involved in researching this point. My objective is to examine the extent of consumer protection afforded citizens in this state and determine the deficiencies in and the means of improving protection afforded Alabama citizens through state action.

As a representative of the people in your district, you are in an excellent position to receive feedback and/or complaints regarding consumer problems in the marketplace. Also, because of your position, I am sure that you have given some thought to the needs, if any, in the area of consumer protection at the state level. Your assistance would be most helpful to my research task. I would greatly appreciate you completing the enclosed, brief questionnaire and returning it at your earliest convenience. Your response to the following questions will remain strictly anonymous--no attempt will be made to associate the replies with specific individuals.

Thank you for your efforts.

Sincerely,

James R. Harris, Instructor

Auburn University
Department of Marketing and Transportation
Auburn, Alabama 36830

July 19, 1972

_____
_____
_____
_____

Dear _____:

The first week in July I mailed a brief questionnaire pertaining to the area of consumer protection to all members of the state legislature. The response has been quite encouraging; however the success of my doctoral research is dependent upon a 100 per cent return. As replies are completely anonymous, I have no way of knowing who has completed the questionnaire and returned it; thus this second request to all. If for some reason you failed to receive the first questionnaire or chose to disregard it, please consider the anonymity of your reply and grant me a few minutes of your time. I would be most grateful. If you have already replied--thank you again for your efforts.

Sincerely,

James R. Harris, Instructor

Enclosure

P.S.: Simply fold questionnaire so that mailing address on back is to outside, staple, affix enclosed stamp, and mail.

# LEGISLATOR QUESTIONNAIRE

1. Approximately how many suggestions and/or complaints pertaining to the area of consumer protection do you receive per month?

   1 - 5 _____, 6 - 10 _____, 11 - 15 _____,

   16 - 20 _____, 21 or more _____

2. How does this number compare with a year ago?

   greater number _____, lesser number _____,

   about the same _____

3. The following is a list of specific legislative areas in consumer protection which might possibly be considered for adoption by the Legislature. A rating scale from +3 to -3 is used to allow you to express your opinion as to the importance of each factor. If you would consider an item to be an important addition to consumer legislation you would give it a high rating by placing an "X" under the +3 or possibly +2. On the other hand, if you feel an item to be unimportant and would thereby not support it, you would give it a low rating of -3 or perhaps -2. The zero (0) position is expressive of a neutral or indifferent response.

| | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|
| Elimination of the holder in due course doctrine | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Making false advertising a civil offense | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Permitting class action suits | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Prohibiting pyramiding sales schemes | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Adoption of the "little FTC Act" | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Closer regulation of warranties | ___ | ___ | ___ | ___ | ___ | ___ | ___ |

| | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|
| Outlawing bait and switch advertising | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Controlling going-out-of-business sales | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Awarding payment of attorney fees in private action suits | ___ | ___ | ___ | ___ | ___ | ___ | ___ |
| Providing for the possibility of forfeiture of fraudulent company's franchise | ___ | ___ | ___ | ___ | ___ | ___ | ___ |

4. Are you aware of any educational, cultural or social factors in Alabama which might make it difficult to protect the interest of consumers?

   In your opinion, how can these be overcome?

5. In general, which legal remedy do you prefer as a means of overcoming consumer abuses?

   criminal penalties _____, civil penalties _____

6. Is there any specific legislation in the area of consumer protection not mentioned here which you feel strongly about?

7. Other comments?

# APPENDIX B

# SUPPLEMENTAL LEGISLATIVE ATTITUDE PROFILES

Chart B-1

Median Profile of Attitudes Toward Support of Specific Legislative Areas of Respondents Receiving No Suggestions and/or Complaints Per Month

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of-business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |

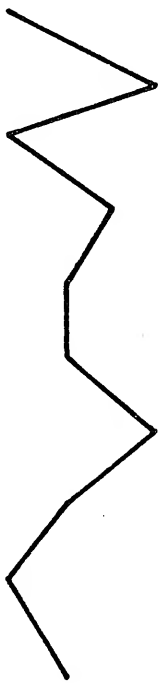


Chart B-2

Median Profile of Attitudes Toward Support of Specific Legislative Areas of Respondents Receiving 1-5 Suggestions and/or Complaints Per Month

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of-business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |

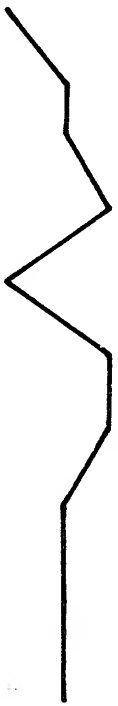


Chart B-3

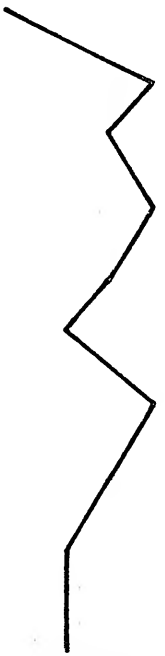
Median Profile of Attitudes Toward Support of Specific Legislative Areas of Respondents Receiving 6-10 Suggestions and/or Complaints Per Month

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of Holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of-business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |

Chart B-4

Median Profile of Attitudes Toward Support of Specific Legislative Areas of Respondents Receiving 11 or More Suggestions and/or Complaints Per Month

| Legislative Area | N/R | -3 | -2 | -1 | 0 | +1 | +2 | +3 |
|---|---|---|---|---|---|---|---|---|
| Elimination of Holder in due course | | | | | | | | |
| Making false advertising a civil offense | | | | | | | | |
| Permitting class action suits | | | | | | | | |
| Prohibiting pyramiding sales schemes | | | | | | | | |
| Adoption of the "little FTC Act" | | | | | | | | |
| Closer regulation of warranties | | | | | | | | |
| Outlawing bait and switch advertising | | | | | | | | |
| Controlling going-out-of-business sales | | | | | | | | |
| Awarding payment of attorney fees in private action suits | | | | | | | | |
| Providing for the possibility of forfeiture of fraudulent co's franchise | | | | | | | | |



# APPENDIX C

## SUGGESTED LEGISLATION - 1973
## UNFAIR TRADE PRACTICES AND CONSUMER LEGISLATION

# Suggested Legislation - 1973: Unfair Trade Practices and Consumer Law

Council of State Governments
Committee on Suggested Legislation

## Section 1. Definitions

As used in this Act,

(1) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(2) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

(3) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(4) "Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgement in respect of any such documentary material or copy thereof.

## Section 2. Unlawful acts or practices

Alternative Form No. 1:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 2:

False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Alternative Form No. 3:

The following unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful:

(1) passing off goods or services as those of another;

(2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of fact;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

(12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding; or

(13) engaging in any act or practice which is unfair or deceptive to the consumer.

Section 3. Interpretation

(a) It is the intent of the legislature that in construing Section 2 of this Act due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45 (a) (1)), as from time to time amended; and

(b) The attorney general may make rules and regulations interpreting the provisions of Section 2 of this Act. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpeting the provisions of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a) (1)), as from time to time amended.

Section 4. Exemptions

Nothing in this Act shall apply to:

(1) Actions or transactions permitted under laws administered by the state public service commission or other regulatory body or officer acting under statutory authority of this State or the United States (or the state fair trade law).

(2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement, and did not have a direct financial interest in the sale or distribution of the advertised product or service.

Section 5. Restraining prohibited acts

Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by Section 2 of this Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the State against such person to restrain by temporary or permanent injunction the use of such method, act or practice, upon the giving of appropriate notice to that person. The notice must state generally the relief sought and be served in accordance with Section 13 of this Act and at least three (3) days before the hearing of the action. The action may be brought in the (trial court of general jurisdiction of the county or judicial district) in which such person resides or has his principal place of business, or, with consent of the parties, may be brought in the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this Act, and such injunctions shall be issued without bond.

Section 6. Additional public relief

The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practice in this Act declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

Section 7. Powers of receiver

When a receiver is appointed by the court pursuant to this Act, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by means of any practice declared to be illegal and prohibited by this Act, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

Section 8. Private and class actions

(a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by Section 2 of this Act, may bring an action under rules of civil procedure in the (trial court of general jurisdiction of the county or judicial district) in which the seller or lessor resides or has his principal place of business or is doing business, to recover actual damages or $200 whichever is greater. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this Section may, if the unlawful method, act or practice has caused similar injury to numerous other persons similarly situated and if they adequately represent such similarly situated persons, bring an action on behalf of themselves and other similarly injured and situated persons to recover damages as provided for in subsection (a)

of this Section. In any action brought under this Section, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

(c) Upon commencement of any action brought under subsection (a) of this Section the clerk of court shall mail a copy of the complaint or other initial pleading to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this Section, the court may award, in addition to the relief provided in this Section, reasonable attorney's fees and costs.

(e) Any permanent injunction, judgment or order of the court made under Section five of this Act shall be prima facie evidence in an action brought under Section eight of this Act that the respondent used or employed a method, act or practice declared unlawful by Section two of this Act.

Section 9. Non-negotiability of consumer paper

(a) If any contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, such note, instrument or evidence of indebtedness shall have printed on the face thereof the words "consumer paper," and such note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code--Commercial Paper.

(b) Notwithstanding the absence of such notice on a note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this Section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this Section. The assignee's liability under this Section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. Failure to imprint the words "consumer paper" on such note, instrument or evidence of indebtedness shall subject the seller or other responsible person to an appropriate civil and criminal sanctions as provided in this Act.

Section 10. Assurances of voluntary compliance

In the administration of this Act, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be violative of the Act from any person who has engaged or was about to engage in such method, act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of (trial court of general jurisdiction of the county or judicial district) in which the alleged violator resides or has his principal place of business, or the (trial court of general jurisdiction of the county or judicial district) in which the State Capitol is located. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest, pursuant to Section 5.

Section 11. Investigation

(a) When it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this Act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any act or practice declared to be unlawful by this Act, he may execute in writing and cause to be served upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation, an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge, or to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) At any time before the return date specified in an investigative demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the (trial court of general jurisdiction of the county of

judicial district) where the person served with the demand resides or has his principal place of business or in the (trial court of general jurisdiction of the county or judicial district) where the State Capitol is located.

Section 12. Subpoenas, hearings, rules and regulations

To accomplish the objectives and to carry out the duties prescribed by this Act, the attorney general, in addition to other powers conferred upon him by this Act, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms and promulgate such rules and regulations as may be necessary, which rules and regulations shall have the force of law; provided that none of the powers conferred by this Act shall be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture; and provided further that information obtained pursuant to the powers conferred by this Act shall not be made public or disclosed by the attorney general or his employees beyond the extent necessary for law enforcement purposes in the public interest.

Section 13. Service of notice, demand or subpoena

Service of any notice, demand or subpoena under this Act shall be made personally within this State, but if such cannot be obtained, substituted service therefor may be made in the following manner:

(1) Personal service thereof without this State; or

(2) The mailing thereof by registered or certified mail to the last known place of business, residence or abode within or without this State of such person for whom the same is intended; or

(3) As to any person other than a natural person, in the manner provided in the (rules of civil procedure) as if a (complaint or other pleading which institutes a civil proceeding) had been filed; or

(4) Such service as a (trial court of general jurisdiction of the county or judicial district) may direct in lieu of personal service within this State.

Section 14. Enforcement of Investigative demands

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand

issued by the attorney general, the attorney general may, after notice, apply to a (trial court of general jurisdiction of the county or judicial district) and, after hearing thereon, request an order:

(1) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(2) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(3) Granting such other relief as may be required, until the person files the statement or report, or obeys the subpoena or investigative demand.

Any disobedience of any final order entered under this Section by any court shall be punished as a contempt thereof.

Section 15. Civil and criminal penalties

(a) Any person who violates the terms of an injunction issued under Section 5 of this Act shall forfeit and pay to the State a civil penalty of not more than twenty-five thousand dollars ($25,000.00) per violation. For the purposes of this Section, the (trial court of general jurisdiction of a county or judicial district) issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the State may petition for recovery of civil penalties.

(b) In any action brought under Section 5 of this Act, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by Section 2 of this Act, the attorney general, upon petition to the court, may recover, on behalf of the State, a civil penalty of not exceeding two thousand dollars ($2,000.00) per violation.

(c) For purposes of this Section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of Section 2 of this Act.

Section 16. Forfeiture of corporate franchise

Upon petition by the attorney general, the (trial court of general jurisdiction of a county or judicial district) may, in its discretion, order the dissolution or suspension or forfeiture of franchise of any corporation which violates the terms of any injunction issued under Section 5 of this Act.

Section 17. Duties of County and City attorneys

It shall be the duty of the County and City attorneys to lend to the attorney general such assistance as the attorney general may request in the commencement and prosecution of actions pursuant to this Act, or, the County or City attorney with prior approval of the attorney general may institute and prosecute actions hereunder in the same manner as provided for the attorney general; provided that if an action is prosecuted by a County or City attorney alone, he shall make a full report thereon to the attorney general, including the final disposition of the matter.

# APPENDIX D

# STATE AGENCY QUESTIONNAIRE

Auburn University
Department of Marketing and Transportation
Auburn, Alabama 36830

August 21, 1972

_____
_____
_____
_____

Dear _____:

The area of consumer protection has received a great deal of attention in the news media and elsewhere in the recent past. As you are aware, numerous Federal and state agencies, such as yours, have been created to afford greater protection to the consuming public. A few states, Alabama among them, have not made the improvements in the area of consumer protection as your state has. My particular research task is to assess the needs of Alabama and to design a model code to regulate unfair advertising and sales practices within this state. Your experience in the "business" of providing consumer protection for the citizens of your state should prove an invaluable aid to my task.

Enclosed you will find a brief questionnaire focusing on some specific points concerning the administration and enforcement of consumer protective legislation. I would greatly appreciate your assistance to my task by completing the questionnaire and returning it at your earliest convenience. Also, because of the dated nature of our legal library, it would be most helpful to receive copies of recent consumer protection legislation so that I might include them in my state by state comparison.

Thank you in advance for your assistance.

Sincerely,

James R. Harris, Instructor

State Agency Questionnaire

1. What is the size of your staff and how is it broken down--i.e., secretarial, investigative, administrative, and other type personnel?

2. What is the annual funding for the fulfillment of your task? _____

   Is there any other source of revenues from which you can draw? _____ If so, what is the source of these funds?

3. Approximately how many complaints does your agency receive per month? _____

4. What are the more common or frequent types of complaints which your office receives?

5. Within your state what, if any, problems have you observed which make it difficult to protect the interest of consumers?

   In your opinion, how can these be overcome?

6. Do you feel that your present legislation in the area of consumer protection is adequate? Yes_____, No_____; Why?

7. Do you have specific consumer legislation in your state which:

| | YES | NO |
|---|---|---|
| Regulates door to door sales? | _____ | _____ |
| Eliminates the holder in due course doctrine | _____ | _____ |
| Makes false advertising a civil offense? | _____ | _____ |
| Permits class action suits? | _____ | _____ |
| Prohibits pyramiding sales schemes? | _____ | _____ |
| Adopts the "little FTC Act"? | _____ | _____ |
| Provides for warranty regulation? | _____ | _____ |
| Outlaws bait and switch advertising? | _____ | _____ |
| Controls going-out-of-business sales? | _____ | _____ |
| Awards payment of attorney's fees in private action suits? | _____ | _____ |
| Provides for the possibility of forfeiture of fraudulent company's franchise? | _____ | _____ |
| Permits the state or county solicitor to bring civil suit in behalf of injured citizens? | _____ | _____ |

8. In light of your experience with consumer problems, what legislative improvements in your state do you feel are needed?

9. What, if any, administrative changes would you make if you were restructuring consumer protection agencies within your state?

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## BIOGRAPHICAL SKETCH

James Robert Harris was born November 15, 1941, in Texarkana, Texas. He attended the public school system through his junior year of high school in Jacksonville, Florida. In June, 1959, he was graduated from Waycross High School in Waycross, Georgia, and the following school year he enrolled in Emory University. He received the degree of Bachelor of Business Administration from Emory University in June, 1963. September, 1963, he entered graduate school in the College of Business Administration at the University of Florida working for the degree of Master of Business Administration. He served as a graduate assistant to the Dean's office during the 1964 academic year. In June, 1964, he received the MBA degree from the University of Florida and the following fall he pursued the course of instruction toward the degree of Doctor of Philosophy. From September, 1964, to June, 1968, he was employed as an interim instructor in the Department of Marketing at the University of Florida. In 1968, he joined the faculty of the School of Business at Auburn University where he is currently employed as an instructor in the Department of Marketing and Transportation.

James Robert Harris is married to the former Liliane Sevilla Kaufmann and is the father of two children, Jennifer and Michael. He is a member of the Southern Marketing Association, the Southeastern Chapter of the American Institute for the Decision Sciences and the Alabama Academy of Sciences.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

J. Donald Butterworth, Chairman
Professor of Marketing

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Ralph H. Blodgett
Professor of Economics

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Associate Professor of Management

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Arvid A. Anderson
Assistant Professor of Marketing

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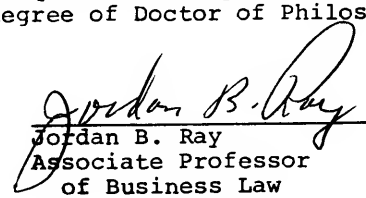

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This dissertation was submitted to the Department of Marketing in the College of Business Administration and to the Graduate Council, and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

August, 1973

Dean, Graduate School